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OCTOBER TERM, 1966.

No. ~~1187~~ 73

IN THE MATTER OF JOHN RUFFALO, JR.,
Petitioner.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit.

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APPENDIX A.

OPINION OF THE SUPREME COURT OF OHIO.

MAHONING COUNTY BAR ASSOCIATION *v.* RUFFALO.

Attorneys at law—Misconduct—Disciplinary action—Suspension—Acts warranting.

(D. D. No. 57—Decided May 20, 1964.)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline.

The facts are stated in the opinion.

PER CURIAM. This proceeding was set in motion in 1962 when the Mahoning County Bar Association filed its written complaint with the Board of Commissioners on Grievances and Discipline, charging John Ruffalo, Jr., an attorney at law of the city of Youngstown admitted to the Bar of Ohio in 1946, with unprofessional and unethical conduct in violation of the Canons of Professional Ethics.

The complaint, consisting of 14 charges, was referred to a three-member hearing panel for the taking of evidence and for report. Upon hearing, the panel concluded that charges numbered 3, 8, 9, 10, 11, 12 and 13 had been proved, and that respondent had violated Canons 10, 27, 29 and 32 of the Canons of Professional Ethics. Based on the findings and conclusions of the panel and the record, the board recommended that respondent be disbarred.

As stated in paragraph five of the syllabus in *In re Lieberman* (1955), 163 Ohio St., 35, 125 N. E. (2d), 328, "the degree of proof required in a disbarment proceeding is a preponderance of the evidence." To the same effect see the *per curiam* opinion in *Cleveland Bar Association v. Fleck* (1961), 172 Ohio St., 467, 469, 178 N. E. (2d), 782.

In cases of this kind, the board of commissioners acts for and on behalf of this court. In doing so, it makes rec-

ommendations as to the facts which should be found and the action which should be taken by this court. However, this court has full responsibility for determining what the facts are and what action should be taken on those facts.

As to charge No. 8, it is stated in respondent's brief:

> "The facts * * * which are alleged in this charge are that respondent 'did advance monies to certain clients * * * while their claims were pending, which advances were deducted from any settlements * * * later received in settlement of said claims.' Those facts do not * * * constitute misconduct * * *.
>
> "* * *
>
> "The record shows that respondent did advance monies to certain clients, but with the understanding that such monies were to be repaid irrespective of the outcome of the pending litigation. * * *
>
> "A loan is not a purchase. So long as there is an agreement that the money is a debt and is to be repaid irrespective of the outcome of the case, it is nonsense to claim that the loan or advance amounts to the *purchase* of an interest in the litigation. Indeed, a contingent fee contract with an assignment to the lawyer (the recovery of which is wholly dependent upon the outcome) comes much closer to the prohibition in this canon [No. 10] than the simple loan or advancement of money. Yet such a fee contract is perfectly valid in the state of Ohio and has been upheld by the courts of Ohio in litigation involving lawyers' claims based upon such contracts. *Roberts v. Montgomery,* 115 Ohio St., 502, *Scheinesohn v. Lemonek,* 84 Ohio St., 424, and *Cleveland Ry. Co. v. Godfrey,* 28 O. L. R., 466 * * *." But cf. Canon 13.

Canon 10 provides:

> "The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."

Canon 42 reads:

> "A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience but subject to reimbursement."

It is clear that the word "expenses" appearing after the semicolon refers to "expenses of litigation.". It would not include advances of the kind admittedly made by respondent for "living expenses * * * during the period between the filing of and the trial or disposal of the case." See opinion No. 288 of the Legal Ethics Committee of the American Bar Association, 41 A. B. A. Journal, 33, issue of January 1955. We cannot reconcile the majority opinion in *People, ex rel. Chicago Bar Association, v. McCallum* (1930), 341 Ill., 578, 173 N. E., 827, on this question with Canons 10 and 42.

It is obvious that, where the advancement of living expenses is made, as in the instant case, to enable a disabled client and his family to survive, any agreement by the disabled client to repay them would not have the effect of providing the attorney with any reasonable source of repayment other than the proceeds received on trial or settlement of his client's claim. In effect, the attorney has purchased an interest in the subject matter of the litigation that he is conducting. The canons contemplate that this will be proper only where the advance is for "expenses of litigation."

It may be observed that the cases of *Roberts v. Montgomery, supra* (115 Ohio St., 502), *Scheinesohn v. Lemonek, supra* (84 Ohio St., 424), *Cleveland Ry. Co. v. Godfrey, supra* (28 O. L. R., 466), and *Reece v. Kyle* (1892), 49 Ohio St., 475, were all decided before this court adopted by rule the Canons of Professional Ethics. In view of the adoption of those canons, those cases would

no longer be applicable to the extent that they are inconsistent with provisions of the canons.

As to charge No. 13, the report of the board summarizes the evidence and facts as follows:

> "It is charged that the respondent conspired with * * * Orlando and paid Orlando money for preparing lawsuits against the Baltimore & Ohio Railroad which was Orlando's employer.
>
> "The evidence in support of this charge is not in dispute. Orlando worked as an investigator for the respondent from 1953 to July 19, 1962. During this same period he was also an employee of the Baltimore & Ohio Railroad. He was suspended by the railroad on July 21, 1962, on charges of soliciting claims. A hearing was held on these charges but Orlando did not appear because he says he was in the New Castle Hospital. During his employment with the respondent, Orlando was paid $25 a day plus expenses and investigated all of the respondent's railroad cases. He said that he worked an average of ten or fifteen days a month for the respondent. Withholding slips, internal revenue form 1099, were received in evidence * * * and showed the following amounts paid to Orlando by the respondent:
>
> "1957 — $2,950.00
> "1958 — 1,250.00
> "1959 — 1,237.37
> "1960 — 3,829.25
> "1961 — 4,716.00
>
> "According to Orlando, respondent paid him in cash for which Orlando said he signed receipts. Orlando said that the respondent kept no records, but paid Orlando on the basis of Orlando's records, but didn't keep these records after his income tax returns were filed * * *. Respondent stated:
>
> " 'We worked on that basis for the particular reason that we didn't want this man to be accused of exactly

what he was accused of, which he wasn't doing and which he did not do, but the fact was that I was trying to protect him. He was trying to help me as an investigator. He had certain knowledge, certain abilities that I needed, and I was trying to protect him, and that was the reason that we worked this thing out this way. With any other person that has ever done any work for me * * * I have paid him by check, but particularly for security reasons for this man, that was the reason we worked it this way.'

"Later respondent testified that he had no record of payments made to Orlando on his books. He also testified that—

" '* * * as soon as they were examined by the Internal Revenue Department, why, we got rid of them, because we didn't want to keep them, because of the fact we didn't want to involve Mike—'* * *.

"The respondent was ordered by a subpoena issued by the board * * * to produce 'all your records, checks, disbursements and receipts of any kind or nature showing payments to Michael Orlando * * * for the years 1957, 1958, 1959, 1960, 1961 and 1962.' Respondent only produced the withholding slips * * *. Respondent was also requested by the chairman of the panel to produce all of his records so that counsel for the relator could determine for themselves whether or not his records contained any entries which would reflect on the payments made by respondent to Orlando * * *. The respondent did not produce his records and refused to comply with the request of the chairman of the panel * * *.

"Although the full extent of Orlando's activities in behalf of the respondent could perhaps be better determined if respondent had submitted his records for examination as requested by the chairman of the panel, there is no dispute about the fact that the respondent did employ Orlando to investigate cases against the Baltimore & Ohio Railroad while Orlando

was working for that railroad * * *. Furthermore, the respondent admits that he kept no entries of payments to Orlando so that he would have no record which would disclose the fact that Orlando was employed by the respondent. The panel questioned the respondent at length * * * on his views relating to the practice of employing Orlando to investigate cases against the Baltimore & Ohio, while he was employed by the company. He saw nothing wrong with the practice because he was 'doing something altogether different from the type of work he was doing on the railroad' * * *. But he admitted employing Orlando because of the advantages in having a railroad man working for him * * *. He saw no distinction between employing any railroad employee and one who was investigating claims against his own employer, because 'our concepts have changed * * *.'"

With respect to this summarization, respondent's brief in this court states:

"As stated by the board, there is no dispute in the evidence with respect to the foregoing charge. The board does indulge in some innuendoes, but the facts relevant to this charge are, simply stated, these: Respondent did hire Michael Orlando to investigate lawsuits for him, and some of those lawsuits involved claims against the Baltimore & Ohio Railroad Company. During this time * * * Orlando was an employee of the Baltimore & Ohio Railroad Company, but engaged in train service, that is, the service of a working railroad brakeman. While we do not consider it material, respondent did frankly testify that he kept no entries of payments to Orlando and that payments were made in cash."

Respondent contends that his employment of Orlando to work against the interests of Orlando's employer, B. & O., was proper by reason of the provisions of Section 60, Title 45, U. S. Code, which reads in part:

> "Any contract, rule, regulation, or device whatsoever * * * to prevent employees of any common carrier from furnishing *voluntarily* information * * * as to the facts incident to the injury or death of any employee, shall be void, and whoever * * * shall attempt to prevent any person from furnishing *voluntarily* such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing *voluntarily* such information to a person in interest, shall, upon conviction * * * be punished * * *." (Emphasis added.)

Obviously this statute would have no application to the instant case. Orlando did not "voluntarily" furnish information. He was paid by defendant to get information.

Respondent's employment of Orlando to work against the interests of his employer, B. & O., so as to benefit respondent and his clients was not an isolated instance. What records respondent was able to produce indicated substantial payments to Orlando in each of five years.

The payment of $4,716 in 1961 was all for work done prior to July 19 of that year.

Respondent now argues that there was nothing wrong with respondent's paying Orlando substantial sums of money to work against the interests of his employer, B. & O., so as to benefit respondent and his clients.

If the respondent did not know that it was wrong to do this, why did he try to cover it up? His testimony that he did this to protect Orlando from charges being made by B. & O. is not convincing testimony that he did not know that this employment of Orlando was wrong.

Why did respondent not produce records to show what the payments were for? The evasive attempts of both Ruffalo and Orlando to explain their lack of records on the basis that they were no longer needed to sustain their

income tax returns arouses a strong suspicion that those records contained information which would have been damaging to both Ruffalo and Orlando. Their 1961 income tax returns could not have been filed before January 1962 and were not due until April 1962. In July 1962, B. & O. charged Orlando with soliciting cases against it for Ruffalo. In September 1962, Ruffalo was charged with employing Orlando to solicit cases for him. Ruffalo undoubtedly knew that such charges were being prepared and investigated long before that time. It is difficult to believe that the 1961 federal income tax returns of either Orlando or Ruffalo had been checked by the Internal Revenue Service before July or even September 1962. At that time, they definitely knew that any records showing either of them to be innocent of charges of soliciting would be helpful to both. It is almost impossible to reach any reasonable conclusion that the records of either, at least for 1961, were not destroyed in order to prevent their use against Orlando in the proceedings brought against him by B. & O. and against Ruffalo in the proceedings brought against him.

In our opinion, one who believes that it is proper to employ and pay another to work against the interests of his regular employer is not qualified to be a member of the Ohio bar. He is even less qualified if he does so, when he knows, as the evidence clearly indicates Ruffalo did know, that it is improper to do so.

This is not the first time that respondent's conduct as a member of the bar has been questioned and found improper. After he was found "guilty of unprofessional conduct in his office as an attorney at law * * * in that he did by and through duly authorized agents and employees solicit professional employment from sundry people" and was disciplined therefor in 1957, he showed a contempt for the court, which made that finding and provided a very

lenient discipline for his misconduct. Although he admittedly was well able to pay costs amounting to several hundreds of dollars and had been ordered by that court to "pay the costs of this proceeding within 30 days," he neglected to make any effort to pay them until shortly before the first hearings in these proceedings more than five years later.

The members of this court are not in agreement as to whether the facts are as the board of commissioners recommended they should be found with respect to some of the other charges against respondent. However, in view of the admitted facts with regard to charges 8 and 13 and the previous judgment of 1957 and the attitude of respondent with respect thereto, we are of the opinion that respondent should be suspended for an indefinite period from the practice of law.

JUDGMENT ACCORDINGLY.

TAFT, C. J., ZIMMERMAN, MATTHIAS, O'NEILL and KERNS, JJ., concur.

GIBSON, J., concurs in the judgment.

HERBERT, J., dissents.

KERNS, J., of the Second Appellate District, sitting by designation in the place and stead of GRIFFITH, J.

GIBSON, J., concurring. In view of the respondent's right to apply for reinstatement after the passage of two years following the order of suspension, I concur in the judgment of the court. Paragraph 21, Rule XXVII of this court. Because of the nature of the issues decided in the instant case, I believe it desirable to comment briefly upon them.

Since it is evident that basically the court and the board of commissioners treat this as a case of solicitation, the following comments may not be inappropriate.

Although the solicitation of law business does not import venality, criminality, fraudulent practices or moral turpitude, it is inimical to the good reputation of the bar. Solicitation within the meaning of Canon 27 can not be precisely defined in such a way as to apply in every case.

Courts surely are not expected to be ignorant of things that other men well know. Everyone knows that attorneys, for their practice, depend upon friends, clients and former clients, and their activities within the community. Friends, acquaintances, and associates of an attorney have the unquestioned right to praise his legal abilities and to divert to him such clients as they can persuade in a legitimate way to engage his services.

This respondent has pursued the personal injury practice of law successfully and aggressively. We would be naive to say that his enterprise has not occasionally carried him into areas where his activity is subject to criticism. In fact, the record clearly shows that in 1957 he was reprimanded by the Common Pleas Court for unprofessional conduct in soliciting professional employment by and through authorized agents and employees.

Charges No. 8 and No. 9 relate to instances where respondent advanced money to certain clients. Respondent admits that such advances were made but justifies them on the ground that they were made as acts of kindness at a time when these clients were in necessitous circumstances.

Clearly, the existence of an attorney-client relationship does not *ipso facto* make a loan from a lawyer to his client against public policy or contrary to the Canons of Professional Ethics. Canon 42 expressly recognizes that a lawyer may in good faith advance expenses of litigation as a matter of convenience but subject to reimbursement. Perhaps an occasional advance or loan by a lawyer to his

client is not proscribed. At best it is a practice which should be followed infrequently and used with extreme caution because it has long been questioned by the courts and the organized bar. It may well be that the advances made by respondent were of such amounts and frequency, and without a sufficiently clear obligation on the part of the clients to reimburse respondent regardless of recovery, that the finding that respondent is guilty of unprofessional conduct in violation of Canon 10 and Canon 27 is proper.

In charge No. 13, the respondent is accused of conspiring with Michael Orlando and paying Orlando money for preparing lawsuits against the Baltimore & Ohio Railroad, which was Orlando's employer. The evidence shows that Orlando worked for the railroad from 11:00 p.m. to 7:00 a.m., five days a week, and that the daytime was his own without restriction. There is nothing unethical in the employment of an investigator. It can not be inferred from such employment that the attorney is "ambulance chasing." In fact the board did not find that Orlando had been soliciting claims for respondent. It found instead that respondent was guilty of misconduct because he was a party to a transaction which caused Orlando to breach his duty of loyalty to his employer.

The principle that "an agent can not serve two masters" is well established. Certainly an attorney may not ordinarily represent principals with conflicting interests, *e.g.*, vendor and vendee of property. But here the respondent was a principal or master and not the agent or servant. It would appear that the penalty, if any, for a transgression of the principal should be borne by the agent, Orlando. I fail to find any provision in Canon 29 or Canon 32 which would require that a sanction be applied against the respondent, who merely made it possible for Orlando to attempt to serve "possible" conflicting interests.

HERBERT, J., dissenting. I am unable to join in the judgment entered in this cause, basically, for two reasons: (1) the judgment in substance overrules long recognized and established principles of law in Ohio, to wit, *Roberts v. Montgomery*, 115 Ohio St., 502; *Scheinesohn v. Lemonek*, 84 Ohio St., 424; *Cleveland Ry. Co. v. Godfrey*, 28 O. L. R., 466; and *Reece v. Kyle*, 49 Ohio St., 475; and (2) a recent decision of the Supreme Court of the United States, being *Brotherhood of Railroad Trainmen v. Virginia, ex rel. Virginia State Bar* (April 20, 1964), , 84 S. Ct., 1113.

The *per curiam* overrules *Reece v. Kyle*, 49 Ohio St., 475. In that case, Spear, C. J., delivered a scholarly opinion of a unanimous court upon the obstacles that have confronted courts for hundreds of years in Anglo-Saxon judicial history. He pointed out the efforts to throttle the vicious practices of champerty and maintenance but also emphasized the ever-present duty of the courts to protect the weak and dependent from oppression by the powerful. While commenting upon rules necessary to control evils of the past, he warned, in the opinion, at page 487:

> "* * * new conditions arisen by reason of which it has become the interest of the powerful to embarrass and hinder the dependent and weak from obtaining speedy justice in the courts."

In the case at bar, respondent, over a period of years, and with a large clientele according to the relator, gave financial aid to three or four needy clients. The importance of financial aid from his lawyer to an injured workman may spell the difference between injustice and justice.

For example, a member of a railroad train crew or yard crew is injured or killed by reason of the negligence of the railroad. The injured man or the dependents,

through a fiduciary, contract with a lawyer to represent them in negotiations for settlement or in litigation.

The railroad offers a meager totally inadequate settlement—a small percentage of what a lawful judgment could reasonably be expected. In making this inadequate settlement offer, the claims department of the railroad advises that the railroad can delay final decision for years. In short, the powerful can close the doors of the courts to the weak by reason of the lack of finances of the claimant.

Under the pronouncement in the case at bar, lawyers in Ohio are not permitted to give or loan financial assistance to a client even though the injured employee or the dependents in case of death are in want and hungry.

People, ex rel. Chicago Bar Association, v. McCallum, 341 Ill., 578, 173 N. E., 827, is a case squarely in point.

There, the facts recited in the opinion are amazing. It is well worth reading. The second paragraph of the syllabus states the law of the case in this language:

> "*Advancing money to indigent client is not against public policy.* The practice of advancing money to the injured client with which to pay living expenses or hospital bills during the pendency of a personal injury case and while he is unable to earn anything, may, in a sense, tend to foment litigation by preventing *an unjust settlement from necessity*, but there is no authority holding that it is against public policy and no reason why it should be so considered, *as a man in indigent circumstances thereby may obtain justice where without such aid he would be unable to do so.*" (Emphasis added.)

Under the holding in the case at bar, the doctrine of the *McCallum* case cannot be followed in Ohio.

Charge 13 and the facts in support thereof are quite simple. One Orlando was a yard employee of the Baltimore

& Ohio Railroad. He released the "air" of incoming trains. He had a regular tour of duty. He performed his duties faithfully and well. He was loyal to his employer in his employment. Respondent employed Orlando during some of his off-duty hours and on his own time to interview witnesses and discover the facts and circumstances surrounding episodes wherein clients of the respondent were injured while in the performance of their railroad duties or were killed by reason of the negligence of the employing railroad.

To establish negligence of a railroad causing such an injury or death, witnesses, who thoroughly understand the intricate and complex construction and operation of railroad mechanical devices and equipment, are essential. Such information and such witnesses are necessary to establish a case, for an injured workman or for the dependents of one killed, by testimony by those familiar with railroading and the operation of trains.

Orlando's employment was not in violation of law. It was thoroughly consistent with enactments of Congress, particularly Section 60, Title 45, U. S. Code, referred to in the *per curiam* opinion. This law intended to make available information to injured employees and persons in interest. Without the aid of Orlando or some other well-informed person, the respondent would not have the names of necessary witnesses and would be handicapped severely in the presentation of a case of an injured railroad workman or the dependents of one killed by reason of the railroad's negligence. By his extra work, Orlando helped the injured and the dependents of the dead to secure justice. The *per curiam* says that Orlando was disloyal to his railroad employer, and the respondent was unworthy of being a lawyer because he used witnesses and information secured by Orlando. The respondent was acting under a law

enacted by the United States Congress above mentioned and in furtherance of the administration of justice.

Respondent furnished records to the Internal Revenue Service to show his payments to Orlando in order to deduct the same from his own income tax. It seems to me that records that satisfy the Internal Revenue Service were all that respondent was required to keep. It is said that Orlando was disloyal to his railroad employer by furnishing information and evidence that would compel his employer to respond to the requirements of justice. Orlando was acting in pursuance to and in accordance with a congressional enactment. He was at the same time giving an invaluable service to injured railroad workmen and the dependents of the dead who were represented by the respondent.

> "A state could not, by invoking the power to regulate the professional conduct of attorneys, *infringe in any way* the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest." (Emphasis added.) *Brotherhood of Railroad Trainmen v. Virginia, ex rel. Virginia State Bar, supra.*

Charge number 13 against the respondent, and the facts offered to substantiate it, appear to me to be clearly contrary to the above-quoted principle of law.

APPENDIX B.

FIRST MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT.

BATTISTI, *J.*:

On May 20, 1964, the Supreme Court of Ohio ordered that Respondent John Ruffalo, Jr., be indefinitely suspended from the practice of law in Ohio. *Mahoning County Bar Association v. Ruffalo,* 176 Ohio St. 263, 199 N. E. 2d 396 (1964). This order became final and effective when, on December 7, 1964, the Supreme Court of the United States denied Respondent's petition for certiorari. *Ruffalo v. Mahoning County Bar Association,* 379 U. S. 931 (1964).

Rule 1(E) of this Court's rules provides in part as follows:

> "E. Disbarment and Discipline. Any member of the Bar of this court may for good cause shown and after an opportunity has been given him to be heard, be disbarred, suspended from practice for a definite time, reprimanded, or subjected to such other discipline as the Court may deem proper.
>
> "Whenever it is made to appear to the Court that any member of its Bar has been disbarred or suspended from practice or convicted of a felony in any other court he shall be suspended forthwith from practice before this court, and, unless upon notice mailed to him at his last known place of residence he shows good cause to the contrary within ten days, there shall be entered an order of disbarment, or of suspension, for such time as the Court shall fix.
>
> "* * *"

Pursuant to Rule 1(E) it was ordered on January 26, 1965, that Respondent suspend his practice in this Court. It was further ordered that Respondent show cause with-

in 30 days why he should not be disbarred from practice in this Court.

On February 25, 1965, Respondent filed his response to the Order to Show Cause. Shortly thereafter, the Court requested that the trustees of the Mahoning County Bar Association appear before the Court to discuss the matter of the disbarment proceedings. Since the Mahoning County Bar Association had aggressively prosecuted the State disbarment proceedings and was obviously the body most familiar with the facts of the case, it was the Court's feeling that said association should represent the interests of the Bar in these proceedings. A substantial number of the trustees of the Mahoning County Bar Association appeared in response to the Court's request for a meeting. At the meeting doubt was expressed as to whether the Mahoning County Bar Association wished to continue its participation in the matter. Rather, it was suggested that the Mahoning Bar would like to inquire whether the Ohio State Bar Association would appear in the proceedings in this Court.*

By order of the Court, a pretrial conference was set for March 26, 1965, to consider questions concerning procedure, stipulations, a hearing date, and any other matters which might be brought to the attention of the Court. The Mahoning County Bar Association was represented at this pretrial conference by Attorneys Joseph Bryan, James Bennett, Jr., and Paul Smith. The Clerk's minutes of the pretrial hearing show that the Mahoning County Bar Association orally moved to appear *amicus curiae* in these proceedings and that said motion was granted by the Court. The Clerk's minutes further show that the

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* On motion by the Respondent, the Court, on March 10, 1965, modified the Order of January 26, 1965, to allow the Respondent to engage in the office practice of law during the pendency of these proceedings.

following schedule was set for the disposition of these proceedings:

(1) Counsel for the Respondent to file a proposed stipulation of facts by April 2, 1965.

(2) The Mahoning County Bar Association to file a statement of its views with regard to the proposed stipulation of facts by April 9, 1965.

(3) The Mahoning County Bar Association to file a brief in opposition to Respondent's response to the Order to Show Cause by April 16, 1965.

(4) A hearing was set for April 26, 1965.

The Court was informed at this time that Attorney Joseph Bryan would be representing the Bar Association.

On April 3, 1965, Respondent filed his proposed stipulation of facts. On April 9, 1965, the Mahoning County Bar Association filed its objections to Respondent's proposed stipulation. On April 16, 1965, the Mahoning County Bar Association filed its brief in opposition to the Respondent's response to the Order to Show Cause.

Several days prior to April 26, 1965, the Court requested that the parties be contacted to confirm the oral hearing set for April 26. The Court learned in this manner that Attorney Joseph Bryan had withdrawn from the case. Thereafter, upon further inquiry, the Court learned through Attorney Oscar Kaufman, President of the Mahoning County Bar Association, that the Bar Association would appear at the hearing on April 26, 1965, but that it did not wish to offer any arguments.

On April 26, 1965, Attorney Craig Spangenberg appeared before the Court representing the Respondent. Attorneys Oscar Kaufman, Bernard Wilkes, and Charles P. Henderson appeared on behalf of the Mahoning County Bar Association. At the conclusion of Mr. Spangenberg's

arguments, the following colloquy took place between the Court and the representatives of the Bar Association:

"Court: Does the Mahoning County Bar, through its President, Mr. Kaufman, wish to argue?

Mr. Kaufman: As President of the Mahoning County Bar Association, I have been directed by its trustees to say to the Court, in substance, that the Mahoning County Bar Association will waive arguments at this time, and will submit this cause to His Honor based upon the briefs filed in the record.

Court: Now, after this record is typed, I would like an opportunity to review it, together with the briefs that have been filed thus far, for some questions that I wish to be argued before me; and at that time, if I do, the representatives of the Mahoning County Bar Association who have appeared, will be ordered to argue those questions. There are some very serious matters here, which I think need a thorough adverse argument. * * *

Mr. Wilkes: If the Court please, I think it should be made clear that no one of the Mahoning County Bar Association has read the record of the proceedings before the Ohio Supreme Court. We are not at all familiar with the contents of that record.

Court: All right, you have made it clear on the record. I think it should be made clear on the record that the Mahoning County Bar Association has had time to read it, but perhaps not you—those sitting here at the counsel table. There was counsel who represented the Mahoning County Bar Association in this matter before this court, and in the case against Mr. Ruffalo before the trial board, and before the Supreme Court of Ohio and the Supreme Court of the United States, but he is not present here. He was on vacation at the time of the first conference. I think he has since returned.

Mr. Kaufman: I regret I am not able to help to analyze that situation.

Court: I cast no doubt against that particular attorney. I just want the record to show that he is not here and has not carried forward this argument.

I will begin immediately to work on this case, and the reporter will get it to me as quickly as possible.

I do want you to be prepared for additional argument before the matter is completed in this court."

It is readily apparent from the above-quoted comments that the Court was, at the time of the hearing, less than satisfied with the conduct of the Mahoning County Bar in these proceedings. Further, the Court was of the opinion that the Mahoning County Bar Association, acting through its trustees, had failed to responsibly execute its duty to the Court and the Bar. Thus, notwithstanding the fact that the Mahoning County Bar Association aggressively prosecuted the State disbarment proceedings, at no time in these proceedings* had any member appeared on behalf of the Association who appeared to have more than a fleeting knowledge of the facts of the case. Under the circumstances of this case, as will be discussed in greater detail subsequently, the aid of the members of the Bar Association who had knowledge of the facts of the case would have been of invaluable assistance to the Court in the disposition of these proceedings.

Notwithstanding the Bar Association's clearly demonstrated apathy towards these proceedings, a motion was filed in this Court on June 9, 1965, requesting an *en banc* hearing. On June 24, 1965, the Court heard oral arguments on this motion. At the conclusion of these arguments the Court denied the request for an *en banc* hearing.

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* Except for an appearance on the motion for hearing *en banc* which was filed after hearing on the merits.

At the oral hearing on June 24, 1965, the Court granted the Bar Association and the Respondent leave to file further briefs on the issues presented with regard to Charge No. 13. The Bar Association filed its supplemental brief on July 6, 1965, and the Respondent a reply thereto on July 12, 1965.

From a reading of the entire record of the State disbarment proceedings, particularly the testimony of one Charles S. White, an employee of the Association of American Railroads, it seems clear that the genesis of the disbarment proceedings against Respondent was an investigation conducted by agents of the Association of American Railroads. (Tr. 770 to 773.) After the investigation of said Association had been completed, the results were turned over to Attorney Jay Brownlee, then President of the Mahoning County Bar Association.* Some time in 1962, charges were filed against the Respondent by the grievance committee of the Mahoning County Bar Association. These charges involved Respondent's relationship with certain persons contacted and interviewed by representatives of the Association of American Railroads in the course of its investigation of the Respondent.

Originally, ten charges were preferred against Respondent. These charges may be briefly summarized as follows:

Charge 1—That Respondent had failed to pay certain costs assessed against him as a result of early disciplinary proceedings.

Charge 2—That Respondent solicited the employment of one Mrs. Clara Beighley of New Castle, Pennsylvania, in a claim against the Baltimore & Ohio Railroad.

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* It seems appropriate to note that Mr. Brownlee has appeared frequently in this Court as the representative of the B. & O. Railroad; but see, Tr. 774 where this line of inquiry was forbidden.

Charge 3—That Respondent, acting through an authorized agent, solicited the claim of one Mrs. Naomi Clark against the Baltimore & Ohio Railroad.

Charge 4—That Respondent solicited, through an agent, namely, Michael Orlando, the claim of one Sam Cotellesse against the P. L. & E. Railroad.

Charge 5—That Respondent attempted to solicit, through an agent, namely, Michael Orlando, the claim of one James F. Quinn against the Baltimore & Ohio Railroad.

Charge 6—That Respondent personally attempted to solicit the claim of Andrew Buletko against the P. L. & E. Railroad.

Charge 7—That Respondent, through an agent, namely, Louis E. McKinney, solicited the claim of one Mrs. Rakestraw against the Pennsylvania Railroad.

Charge 8—That Respondent advanced certain monies to Mrs. Beighley, Mrs. Clark, and Sam Cotellesse while handling their claims and deducted said advances from settlements of their claims.

Charge 9—That Respondent promised to advance money and later did advance money to one Andrew Masters during the pendency of his case against the Pennsylvania Railroad.

Charge 10—That Respondent was guilty of unprofessional conduct in attempting to influence one Elija Doster in that he endeavored to have Doster sign a false statement that Doster had not been contacted by the Respondent in an effort to have Doster help in the solicitation of the case of Naomi Clark and that at the time Respondent attempted to take said false statement from Doster and he paid him the sum of $50.00 in cash.

In the latter part of 1962, a three-member hearing panel was convened for the taking of evidence and for a report on the charges made against Respondent. During the course of this hearing, four additional charges were preferred against the Respondent. These charges may be briefly summarized as follows:

Charge 11—That Respondent attempted to intimidate Samuel Doster who was to appear before the hearing panel and that Respondent gave said Samuel Doster a fifth of whiskey and $5.00 for the purpose of prevailing upon him to prevent his father from appearing as a witness.

Charge 12—That Respondent, through one or more of his agents acting on his behalf, attempted to intimidate witness Andrew Masters by having his agent offer Masters the sum of $300.00 to keep him from appearing before the panel.

Charge 13—That Respondent conspired with Michael Orlando and paid Orlando money for preparing lawsuits against the Baltimore & Ohio Railroad, which was Orlando's employer.

Charge 14—That Respondent, through Michael Orlando, solicited the right to represent Amerzia Montgomery and his wife, Mildred Montgomery, in their claims on behalf of their minor daughter, Sheila. As is readily apparent, many of the above-summarized charges are of a most serious character.

The proceedings before the three-member panel were lengthy (the record covering 1033 pages), in part extremely bitter,* and in content extremely extraordinary. The record of the proceedings is replete with charges of actual or attempted intimidation of witnesses. The record

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* See, for example, Tr. pp. 154, 510, 558 and 758.

further contains at least one instance of admitted perjury and other instances where persons obviously perjured themselves.

The alleged misconduct on the part of the Respondent with regard to the proceedings themselves is, in large part, reflected in the charges which have been set out above. The charges or indications of misconduct in the prosecution of the Respondent in large part arise out of the involvement of the Association of American Railroads in the proceedings. Generally, the charges made against the Association of American Railroads relate to intimidation of witnesses and the suborning of perjury.

The involvement of the Association of American Railroads in the proceedings was not insignificant, in fact quite prominent; and, as noted above, it is evident that the disbarment proceedings grew out of an investigation conducted by said Association. It seems equally evident, from a review of the entire record, that representatives of the Mahoning County Bar relied heavily upon the work of the said Association in the prosecution of the Respondent. In fact, throughout the hearing, the Association had the following four representatives present:

> The Assistant Director, J. A. Sherman of Chicago, Illinois;
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> His Assistant, J. V. Lynch of Memphis, Tennessee;
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> Investigator, F. N. Van Luit of Rochester, New York; and
>
> Investigator, Charles S. White of Pittsburgh, Pennsylvania.

Were this Court to indulge in innuendo, it would have to conclude that charges made against the Association of American Railroads are credible. To a certain extent the nature of this Association's involvement in disciplinary

proceedings is demonstrated by the following quote from a speech given in 1956 by one Kenneth A. Carney, head of the Claims Research Bureau of the Association:

> "There have been successfully (sic) disbarment proceedings tried in Oklahoma City, in Chicago, in Ohio, and one of the nice things that I like about all of this is that it is being accomplished in such a way that the bar associations handling these matters are convinced that such action is more in their interest than ours. And their selfish interest is aroused to the point where they have thus far carried the load for us in practically every proceeding that has thus far been instituted."
>
> (General Claims Division, Association of American Railroads, 67th Annual Meeting, Shamrock-Hilton Hotel, April 18-20, 1956, Houston, Texas, p. 108.)

This organization's conduct has not escaped unfavorable comment by the courts. In *In re Heirich,* 140 N. E. 2d 825, 10 Ill. 2d 357 (1956), the Supreme Court of Illinois made the following comments with regard to the involvement of the Association of American Railroads in the prosecution of one B. E. Heirich:

> "There seems to be no question but what a group of railroads commenced this prosecution and that they hired George Ericksen to prepare the complaint and secure the evidence. This he proceeded to do without a conscience. We are sure that we are not doing violence to this record when we say that Ericksen, in constructing the case against Respondent, was guilty of subornation, bribery, deceit, trickery, entrapment and false impersonation. * * *"

That members of the Association of American Railroads evidently condone the attitude reflected in Mr. Carney's speech certainly does not commend members of

said Association to the admiration of the Bar. While it is an obvious truth that the railroads have, over the years, been unjustly injured as a result of unethical practices of some attorneys, and while it is further clear that the railroads have an absolute right to attempt to remedy such injustices, it nonetheless follows that they should not be permitted to use legal ethics or bar associations as a banner under which to unscrupulously advance their own economic self interests.

Other Courts have in the past and will in the future comment adversely upon any bar association or members thereof who become a party to an effort on the part of any special interest group to serve their own interests by or through disciplinary proceedings against members of the bar. As stated so eloquently by Justice Cardozo in *People ex rel. Karlin v. Culkin*, 248 N. Y. 465, 162 N. E. 487:

> "If the house is to be cleaned, it is for those who occupy and govern it, rather than for strangers, to do the noisome work."

In this vein, the comments of the Supreme Court of Missouri in *In re Sizer*, 267 S. W. 922, 924 are very much in point:

> "While the charges are nominally filed by officers of the bar associations, they were clearly induced by the representatives of the corporations aforesaid. The bar associations took up this case at such suggestions. It does not clearly appear in the record, but it can well be inferred from what does appear, that these corporations are financing this case. That they financed Pendell is openly admitted. That they were contributing to a fund at the rate of $50.00 each per month is candidly stated. This much more than paid Pendell and his legitimate expenses. How long these payments were to continue does not appear, but we are but humans, and can draw conclusions from

admitted facts. The evidence further discloses that feelings ran high in Kansas City, and an attempt was made to organize another bar association in that city on the pretense that the then present association officers were men largely engaged in protecting corporation clients from damage suits. These lawyers were largely engaged by plaintiffs in damage suits and they proceeded through their investigators to investigate the defending damage suit lawyers and from dissatisfied clients, the evidence shows many affidavits were obtained against some of them. No action was ever taken upon them, however, and the proposed new association never materialized. Sizer & Gardner had nothing to do with the Kansas City move. It clearly appears that the move first started in Kansas City, as stated above, and finally Sizer & Gardner were made the subjects of investigation before the present action.

"Let us speak plainly, as Courts should speak, and say that every earmark of the evidence in this case shows that it is an effort by corporation lawyers as against what they call damage suit lawyers. All this (true as it may be, and as we think it is) does not change the case. The motive for preferring the charges is of small consequence, if, in fact, the charges are sufficient in law, and the respondents are guilty. So that we can concede a contest (upon the one side) by the defending corporation damage suit lawyers and the prosecuting damage suit lawyers upon the other, and the case yet remains as to the sufficiency of the proof. If the bar associations, sua sponte, had preferred the charges, we would have one background, but where the corporation lawyers of the associations have induced the associations to act upon evidence procured by a special expert, such as Pendell, the background is different. We have to take the picture as it is made to appear. Fifty per from a long list of interested corporations will cover much more than Pendell got for procuring affidavits. Such is a general

outline. In our limited experience at the bar we represented (at different periods) both sides of such cases as are involved here, and we hope not to overdraw inferences from the evidence before us."

At the conclusion of the hearing, the hearing panel found that Charges Nos. 3, 8, 9, 10, 11, 12 and 13 had been proved and that Respondent had violated Canons 10, 27, 29 and 32 of the Canons of Professional Ethics. Based on the findings and conclusions of the panel and the record, the Board of Commissioners on Grievances recommended that Respondent be disbarred.

Under the procedures established for disciplinary proceedings, the matter then went before the Supreme Court of Ohio. In *Mahoning County Bar v. Ruffalo*, 176 O. S. 263, 199 N. E. 2d 396 (1964), the Supreme Court of Ohio made this comment with regard to its responsibility:

"In cases of this kind, the Board of Commissioners acts for and on behalf of this court. In doing so, it makes recommendations as to the facts which should be found and the action which should be taken by this court. However, this court has full responsibility for determining what the facts are and what action should be taken on those facts."

On the basis of certain admitted facts, the Ohio Supreme Court, with Judge Herbert dissenting, concluded that Respondent was guilty of a breach of professional ethics with regard to matters contained in Charges No. 8 and No. 13.* The Court made only one brief reference to the other charges made against the Respondent. In the last paragraph of the Per Curiam opinion, the Court stated that:

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* Judge Gibson, in a concurring opinion, expresses considerable doubt as to some of the conclusions reached by the majority.

"The members of this court are not in agreement as to whether the facts are as the Board of Commissioners recommended they should be found with respect to some of the other charges against Respondent. However, in view of the admitted facts with regard to charges No. 8 and No. 13 and the previous judgment of 1957 and the attitude of Respondent with respect thereto, we are of the opinion that Respondent should be suspended for an indefinite period from the practice of law."

It is not surprising that the Supreme Court of Ohio did not, on the basis of the record presented, make findings with regard to the other charges. Where, as here, serious charges of misconduct are made; and, where, as here, those charges substantially affect the credibility of all, or nearly all of the witnesses it would be impossible to make, judiciously, findings of fact without having had the benefit of a personal confrontation with said witnesses.

Since the proceedings in this Court are predicated upon the findings of the Ohio Supreme Court, this Court's consideration will be limited to those charges upon which findings were made by the Ohio Supreme Court.

While, as noted above, the "record" presented to this Court is in many respects distressing, it must nonetheless be noted that the evidence with regard to Charges No. 8 and No. 13 is undisputed and, therefore, untainted by charges and countercharges of misconduct in the prosecution of the State disbarment proceedings. This being so, the evidence with regard to Charges No. 8 and No. 13 must be viewed outside of the shadow cast by the unresolved charges of misconduct.

In *Theard v. United States*, 354 U. S. 278 (1957) the Supreme Court made the following comments relative to federal disbarment proceedings predicated upon disbarment by a state court:

"While a lawyer is admitted into a federal court by way of a state court, he is not automatically sent out of the federal court by the same route. The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included. The Court's control over a lawyer's professional life derives from his relation to the responsibilities of a Court. * * *

"Disbarment being the very serious business that it is, ample opportunity must be afforded to show cause why an accused practitioner should not be disbarred. If the accusation rests on disbarment by a state court, such determination of course brings title deeds of high respect. But it is not conclusively binding on the federal courts. The recognition that must be accorded such a state judgment and the extent of the responsibility that remains in the federal judiciary were authoritatively expounded in *Selling v. Radford,* 243 U. S. 46. The short of it is that disbarment by federal courts does not automatically flow from disbarment by state courts."

In *Selling v. Radford,* 243 U. S. 46 (1917) the Supreme Court made the following observations relative to the responsibility of the federal judiciary in cases such as the present:

"In other words, in passing upon the question of the right to continue to be a member of the Bar of this court, we think we should recognize the absence of fair private and professional character inherently arising as the result of the action of the Supreme Court of Michigan so far as we are at liberty to do so consistently with the duty resting upon us to determine for ourselves the right to continue to be a member of this Bar. That is to say, we are of opinion that we should recognize the condition created by the

judgment of the state court unless, from an intrinsic consideration of the state record, one or all of the following conditions should appear:

1. That the state procedure from want of notice or opportunity to be heard was wanting in due process; 2, that there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not consistently with our duty accept as final the conclusion on that subject; or 3, that some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice, we were constrained so to do."

Respondent herein urges that the admitted facts do not constitute a sufficient ground for disciplinary action; and, therefore, "under the principles of right and justice" he should not be disbarred from practice in this court.

CHARGE No. 8.

The admitted facts with regard to Charge No. 8 are as follows. Clara Beighley and Naomi Clark were both widowed by the death of their husbands in railroad accidents. Respondent represented both women in actions brought under the Federal Employers' Liability Act. During the period of years in which he represented these women, Respondent from time to time made small advances to both in order that they might meet certain living expenses. The amounts advanced were to be repaid regardless of the outcome of the litigation. Ultimately, the advances were deducted from the proceeds of settlements

of their claims. The advances to Mrs. Beighley totaled $1,025.00 and those to Mrs. Clark totaled $711.00.

In holding that the Respondent acted improperly in making the aforementioned advances, the Ohio Supreme Court made, inter alia, the following observations:

> "Canon 10 provides:
>
> The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting.
>
> "Canon 42 reads:
>
> A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience but subject to reimbursement.
>
> "It is clear that the word, 'expenses' appearing after the semicolon refers to 'expenses of litigation.' It would not include advances of the kind admittedly made by respondent for 'living expenses * * * during the period between the filing of and the trial or disposal of the case.' See opinion 288 of the Legal Ethics Committee of the American Bar Association, 41 A. B. A., Journal 33, issue of January 1955. We cannot reconcile the majority opinion in *People, ex rel. Chicago Bar Association v. McCallum* (1930), 341 Ill. 578, 173 N. E. 827, on this question with Canons 10 and 42.
>
> "It is obvious that, where the advancement of living expenses is made, as in the instant case, to enable a disabled client and his family to survive, any agreement by the disabled client to repay them would not have the effect of providing the attorney with any reasonable source of repayment other than the proceeds receiving on trial or settlement of his client's claim. In effect, the attorney has purchased an interest in the subject matter of the litigation that he is conducting. The canons con-

template that this will be proper only where the advance is for 'expenses of litigation.'" 176 Ohio St. 263, 264, 265.*

In *People, ex rel. Chicago Bar Association v. McCallum*, 173 N. E. 827 (1930), the Illinois Supreme Court made the following comments with regard to the propriety of advancing funds to needy clients:

> "The evidence shows that at various times the McCallums have advanced living expenses to needy clients who had claims for personal injuries against railroad companies where respondent had a fee contract, which was a lien upon any damages which might be recovered upon the injury. In most such cases the clients were unable to work, had no money or property, and their only asset was the claim for damages against the railroad, upon which respondent had a lien. We know of no law which makes it more unethical, under such circumstances, to advance living and medical expenses to the client, and so prevent his becoming a public charge, than it would be, if the client's only asset were a piece of real estate, to advance him, on a mortgage thereon, money for such expense. It is not uncommon for attorneys to commence actions for poor people and make advances of money necessary for the prosecution of the suit upon the credit of the cause. Thus a man in indigent circumstances is enabled to obtain justice in a case where without such aid he would be unable to enforce a just claim. *Christie v. Sawyer*, 44 N. H. 298; *Shapley v. Bellows*, 4 N. H. 355. The practice of advancing money to the injured client with which to pay living expenses or hospital bills during the pendency of the case and while he is unable to earn anything may in a sense tend to foment litigation by preventing an unjust settlement from necessity, but we

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* The views expressed by the Ohio Supreme Court are nearly identical to those expressed in opinion No. 288 of the Legal Ethics Committee of the American Bar Association.

are aware of no authority holding that it is against public policy or of any sound reason why it should be so considered. *Johnson v. Great Northern Railway Co.*, 128 Minn. 365, 151 N. W. 125, L. R. A. 1917B, 1140; *Potter v. Ajax Mining Co.*, 22 Utah 273, 61 P. 999. By canon 42 of the Ethics of the American Bar Association, it is permissible for an attorney to advance costs and court charges for his client, with the understanding that the same are to be ultimately paid by the client."

As the Ohio Supreme Court has itself noted, the above-quoted portion of the Illinois Supreme Court's opinion in *People, ex rel. Chicago Bar Association v. McCallum, supra,* may not be reconciled with the Ohio Supreme Court's per curiam opinion in *Mahoning County Bar Association v. Ruffalo.*

In *McCallum,* as in *Ruffalo,* reference is made to Canon 42. That canon provides as follows:

"A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement."

As the portion of Canon 42 preceding the semicolon provides, an attorney may not properly agree to pay or bear the expenses of litigation. See: *Peck v. Heurich,* 167 U. S. 624 (1897), *Watkins v. Sedberry,* 261 U. S. 571 (1923). As may readily be noted, Canon 42 further provides, however, that such expenses may be advanced *subject to reimbursement.*

It seems clear that Canon 42 in its entirety is concerned solely with the specific matter of expenses such as court costs, etc., and not with "living expenses" of the client. In providing that an attorney may, under certain circumstances, properly advance expenses of litigation,

Canon 42 neither implicitly nor explicitly provides that advances which are subject to reimbursement, but which are made for other purposes, are otherwise improper.

In *Ruffalo*, the Ohio Supreme Court, after concluding that the advances in question in effect constituted the purchase of an interest in the subject matter of the litigation, then went on to say that such a "purchase" is proper only to the extent that it covers expenses of litigation. In this Court's opinion, the canons provide no exception to the prohibition contained in Canon 10. To say that the latter portion of Canon 42 provides an exception to Canon 10 in effect is to say that Canon 42 contemplates that any advances subject to reimbursement, including advances of the expenses of litigation, constitute a purchase of an interest in the subject matter of the litigation. In this Court's opinion, such a construction is entirely unwarranted. As the Court has already noted, that portion of Canon 42 following the semicolon merely provides that advances of the expenses of litigation subject to reimbursement are proper, and in no manner indicates that they are otherwise improper. As will subsequently be noted, this is not to say, however, that under all circumstances advances subject to reimbursement are actually proper.

In *McCallum*, the Illinois Supreme Court does not say that the advances there involved were specifically justifiable under Canon 42. Rather, the Court appears merely to be making an analogy between the advances it was considering and the advances authorized by Canon 42.

In holding that the Respondent herein purchased an interest in the subject matter of the *Beighly* and *Clark* litigation, the Ohio Supreme Court did not hold that all loans to clients are improper. In this regard, the comments of the Connecticut Supreme Court in *Grievance Committee*

of Fairfield County Bar. v. Nevas, 139 Conn. 660, 666-667, 96 A. 2d 802, 805 (1963) appear to be most pertinent:

> "By loaning money to his client, the defendant put himself in a position where his personal interest might well become adverse to hers. The making of such a loan by a lawyer is not, however, necessarily unethical conduct. It is unethical only if the loan is made to accomplish some purpose contrary to the client's welfare or if, in seeking repayment, the lawyer pursues practices which are unfair or unduly oppressive."

Other courts have reached the same conclusion. See: *Hildebrand v. State Bar*, 18 Cal. 2d 816, 824; 117 P. 2d 860, 863-864 (1941); *Mytton v. Missouri Pacific Railroad Co.*, 211 S. W. 111 (1919); *State ex rel. The Florida Bar v. Dawson*, 111 So. 2d 427, 430 (1959); and see, also, *Mahoning County Bar Association v. Ruffalo*, concurring opinion by Gibson, J.:

> "Clearly, the existence of an attorney-client relationship does not *ipso facto* make a loan from a lawyer to his client against public policy or contrary to the Canons of Professional Ethics."

This Court concludes that the practice of making loans to clients is not *per se* unethical.

While it would be unethical to promise to make loans in an effort to obtain a prospective client's business, or to accomplish a purpose contrary to the client's interest, or to use unfair tactics in seeking repayment, no such contention was made in the instant case.

The record in this case does not indicate that Respondent was engaged in a wide scale practice of making substantial loans to a large number of his clients. On the contrary, the evidence indicates that Respondent made loans to relatively few clients; that the loans were made after the clients had retained Respondent to represent

them; that the loans were made at the request of the client; and that the amounts of the loans were, considering the period over which they were made, not substantial in amount. Under these circumstances, it would be unreasonable to find that the making of these loans by the Respondent constituted a practice calculated to solicit employment by others or as a gimmick to unethically advertise his services.

The question remains as to whether, under the circumstances, the advances in question constituted a purchase of an interest in the subject matter of the litigation. In this regard, it must be noted that the evidence to the effect that the clients had an unconditional obligation to repay the advances is as uncontroverted as the fact that the loans were made. In finding that the advances in question "in effect" constituted a purchase, the Ohio Supreme Court did not find that the obligation of Respondent's clients to repay the advances was in any manner conditional. Rather, the Court merely stated that:

> "* * * Where the advancement of living expenses is made, as in the instant case, to enable a disabled client and his family to survive, any agreement by the disabled client to repay them would not have the effect of providing the attorney with any reasonable source of repayment other than the proceeds received on trial or settlement of his client's claim. In effect, the attorney has purchased an interest in the subject matter of the litigation that he is conducting."

The record of the State disbarment proceeding does not contain any direct evidence relative to the ability of Mrs. Beighly and Mrs. Clark to repay the amounts advanced by Respondent out of funds other than those received on trial or settlement of their claims. The record does indicate, however, that at the time the advances were made,

said clients were probably in a desperate financial condition. Under these circumstances, it would seem reasonable to infer that it might have been most difficult for the clients to repay the advances out of funds other than those obtained from the trial or settlement of their cases. It may not, however, in this Court's opinion, be reasonably inferred under these circumstances that it would have been impossible for the clients to repay the advances out of funds which might subsequently have become available from sources other than the trial or settlement of their cases.

It is not in consonance with this Court's concept of justice or the underlying purposes of the Canons of Professional Ethics that a loan otherwise proper is rendered improper because of the indigency of the client. In *Reece v. Kyle,* 49 O. S. 475; 31 N. E. 747, 750, the Ohio Supreme Court made the following comments:

> "* * * Beyond this, the propriety of accepting compensation by way of a fee contingent upon the event of the suit, and payable out of the thing recovered, has been recognized. Also the advancing by the attorney, for the benefit of the client, of funds in payment of costs and necessary incidental expenses. Indeed, such advances by the attorney in the progress of litigation, is so common that to denounce the practice as improper would be to condemn the daily acts of the most honorable members of the profession. *Wylie v. Coxe,* 15 How. (U. S.) 415; *Stanton v. Embrey,* 93 U. S. 548; *Allard v. Lamirande,* 29 Wis. 502; *Newkirk v. Cone,* 18 Ill. 449; *McDonald v. Railroad Co.,* 29 Iowa 171; *Quint v. Mining Co.,* 4 Nev. 304. This upon the idea of duty on the part of the profession to investigate the claims, and give professional aid in redressing the wrongs of the indigent who have been injured, for in this way many poor people are enabled to obtain justice, where, without such aid they would be rem-

> ediless. And it has been considered that there is no practical distinction between such an arrangement and one where counsel undertake, for an agreed fee, to be paid in the future, the prosecution of a case for a client so poor that unless the cause be gained the attorney could not possibly realize any compensation whatever. That a contract of the latter kind is legal was held in *Moore v. Trustees,* 9 Yerg. 115. * * *"

In its opinion in *Ruffalo,* the Ohio Supreme Court, after noting that *Reece v. Kyle, supra,* was decided prior to its adoption of the Canons of Professional Ethics made the following comment:

> "In view of the adoption of the canons, those cases (including *Reece*) would no longer be applicable to the extent that they are inconsistent with the provisions of the canons."

It appears that under Canon 42 the contract which was before the Ohio Supreme Court in *Reece* might well be now technically improper. It does not appear, however, that the reasoning in *Reece* relative to the problems presented in cases involving indigent litigants is in any manner inappropriate or in conflict with the Canons of Professional Ethics.

In his dissenting opinion in *Ruffalo,* Judge Herbert makes the following pertinent comments relative to the problems confronting the indigent litigant:

> "In the case at bar, Respondent, over a period of years, and with a large clientele according to the relator, gave financial aid to three or four needy clients. The importance of financial aid from his lawyer to an injured workman may spell the difference between injustice and justice.
>
> "For example, a member of a railroad train crew or yard crew is injured or killed by reason of the negligence of the railroad. The injured man or the de-

pendents, through a fiduciary, contract with a lawyer to represent them in negotiations for settlement or in litigation.

"The railroad offers a meager totally inadequate settlement—a small percentage of what a lawful judgment could reasonably be expected. In making this inadequate settlement offer, the claims department of the railroad advises that the railroad can delay final decision for years. In short, the powerful can close the doors of the courts to the weak by reason of the lack of finances of the claimants.

"Under the pronouncement in the case at bar, lawyers in Ohio are not permitted to give or loan financial assistance to a client even though the injured employee or the dependents in case of death are in want and hunger."

In Section 542 of the *Restatement of Contracts*, the following illustration is set forth:

Illustration No. 2.

"A, an attorney at law, undertakes to prosecute a claim of B, a poor person who has been hurt in an accident. B promises that A shall have one-fourth of the recovery as his fee. A does not agree to pay the expenses of enforcing the claim but knows that he will have to advance the money needed, since B is without funds. The bargain is not illegal, and A may retain from the amount recovered the agreed fee and also the expenses of enforcement of his claim."

The above-quoted illustration from the *Restatement of Contracts* merely reflects the traditional attitude of fairness which the courts have taken toward the relationship between attorneys and indigent clients, and is thoroughly consistent with Canon 42.

Whether it be the attorney's fee, the expenses of litigation, or unconditional loans, the fact that it might be difficult or unlikely that the client will be able to reimburse

the attorney for the same absent a recovery on his claim should not render the attorney's conduct improper. While the Mahoning County Bar Association has urged that a different approach must be taken with regard to loans, it has not presented, nor can this Court discern, any reasonable basis for taking a different approach with regard to the same. The Court finds that the advances made by the Respondent did not constitute the purchase of an interest in the subject matter of the litigation in violation of Canon 10. The Court further finds that the conduct of the Respondent with regard to such advances was not in any other respect improper. Therefore, the conduct complained of does not constitute a ground for disbarment from practice before this Court. To the extent that the Ohio Supreme Court's views in *Ruffalo v. Mahoning County Bar Association* are different than those expressed herein, the Court respectfully disagrees with the same and declines to follow them.

CHARGE NO. 13.

From 1957 until 1961 Respondent employed one Michael Orlando as an investigator, paying him as follows:

1957	$2950.00
1958	1250.00
1959	1237.37
1960	3829.25
1961	4716.00

During this same period Orlando was also employed by the Baltimore & Ohio Railroad as a car bleeder, that is to say, he was responsible for bleeding air out of train brakes. His hours of employment for the Baltimore & Ohio Railroad were from 11:00 p.m. to 7:00 a.m. His hours of employment for Respondent were during the daytime when he was not employed by the Baltimore & Ohio Railroad.

While Respondent admits that Orlando spent some of his time during the five-year period (1957-1961) investigating cases involving the Baltimore & Ohio Railroad, there is no evidence to indicate what percentage of time he was so employed.

It was noted at the outset that among the original charges brought against Respondent were those to the effect that Respondent employed Orlando to solicit cases, and it was further noted that it was not surprising that the Supreme Court of Ohio made no findings with regard to those charges. Almost at the very beginning of the State disbarment proceedings (Tr. 27) the matter of Orlando's employment by Respondent and the adequacy of his payment records were first inquired into, and the same continued to be inquired into from time to time throughout the trial. This line of questioning, the testimony elicited thereon, and the exhibits used were relevant only insofar as they tended to support the solicitation charges. However, much later in the proceedings (Tr. 656 et seq.) members of the hearing panel inquired of Respondent as to the propriety of employing a railroad employee as an investigator in cases where the railroad employer was a party. The inquiry by the panel members in this regard was rather esoteric in nature because they did not inquire into the duties or circumstances of Orlando's employment in any of the cases involving the Baltimore & Ohio Railroad and Respondent's claimants. In any event, in the middle of this colloquy (Tr. 662) counsel for the Bar Association, *relying only on the evidence admitted up to that point* (Tr. 671, 672), moved to add an additional specification, charging Respondent as follows:

> "That Respondent did conspire with one, Michael Orlando, and paid said Michael Orlando moneys for

preparing lawsuits against the B. & O. Railroad, the employer of said Michael Orlando, during all the periods of time extending from 1953 to July of 1961, well knowing that said practice was deceptive in its nature and was morally and legally wrong as respects the employee, Michael Orlando, toward his employer, the B. & O. Railroad Company."

The panel, over vigorous objection of the Respondent on the grounds of timeliness and surprise, allowed the additional charge. Thus the "evidence" introduced on the solicitation charge (which the Ohio Supreme Court, in substance, dismissed) suddenly, without notice, and at least half-way through the trial became relevant to a wholly new charge not theretofore contemplated by any of the the parties. The charge Respondent faced at this juncture was one of "conspiracy" to engage in a "deceptive practice" which is "morally * * * and legally wrong as respects the employee, Michael Orlando, toward his employer, the Baltimore & Ohio Railroad."

Notwithstanding the fact that no evidence was admitted to prove that Respondent's employment of Orlando encouraged or resulted in any actual conflict of his duties owed to the Baltimore & Ohio Railroad, this added charge constituted one of the two grounds on which he was indefinitely suspended from the practice of law in Ohio.

At the outset of discussion on this basis for disbarment, it must be noted that the employment of an individual to do work in any manner related to the operations of that individual's regular employer is a practice which might well be fraught with difficulties, and that the regular employer might well be sensitive in this regard. In the present case it is clear that Respondent realized that the Baltimore & Ohio Railroad might cast a jaundiced eye towards Orlando's employment by Respondent to the

extent that it involved investigation of cases to which it was a party. Under these circumstances, it might have been the soundest and most appropriate course of action for the Respondent to have limited Orlando's investigative work to cases other than those involving the Baltimore & Ohio Railroad.

While this Court believes that Respondent might not, under these circumstances, have employed the soundest and most appropriate course of action, the question remains as to whether the course of action which Respondent did follow constitutes a ground for disbarment for practice before this Court.

There need be no citation of authority for the principle that an attorney may not, under any circumstances, employ an individual to do work contrary to or in violation of a fiduciary duty that said individual owes to another party. This general principle of law is manifestly inapplicable to the instant case because Orlando clearly owed no fiduciary duty to the Baltimore & Ohio Railroad. Rather, his employment by the Baltimore & Ohio Railroad was of a most menial nature.

The record of the State disbarment proceedings contains very little evidence relative to the exact nature of the activities of Orlando as an investigator for Respondent. The evidence with regard to Orlando's activities as an investigator is summarized in the following statement made by the Respondent:

> "His job specifically has been to investigate cases which I turn over to him to investigate particularly pertaining to railroad cases, to find witnesses, to obtain statements from witnesses, to help me in—and assist me in matters regarding railroad knowledge and the operation of railroads, and on occasion to transport witnesses for me." (Tr. 765.)

There is no evidence, nor is there any claim made, that Orlando trespassed upon Baltimore & Ohio Railroad property to obtain information relative to cases involving the Baltimore & Ohio Railroad.* Further, there is no evidence, nor is there any claim made, that Orlando used surreptitious means in order to obtain confidential information held by the Railroad, or, for that matter, that Orlando in any other manner obtained such information. See, *In Re Noell*, 234 Mo. App. 1162, 96 S. W. 2d 213 (1936); and *In Re Newell*, 174 App. Div. 94, 160 N. Y. S. 275 (1916).

It is noteworthy that Respondent did not hire Orlando specifically to investigate cases involving the Baltimore & Ohio Railroad. Rather, he hired Orlando to investigate all of his railroad cases. This factor, it would seem, substantially negates any contention that Respondent's employment of Orlando was for the purpose of taking unfair advantage of Orlando's status as an employee of the Baltimore & Ohio Railroad.

As noted above, the employment of an individual to do such investigative work may well be a matter towards which the regular employer will be sensitive. However, in judging the conduct of an attorney the Court must consider the sensitivities and interests of all parties without subservience to any of them. Here we have under attack the conduct of an attorney in his effort to serve the interests of his clients. In the preparation of litigation, counsel for both sides necessarily engage in conduct towards which the other side will be sensitive. This is to be expected in adversary proceedings. Where an attorney is charged with

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* In *Ry. Clerks v. Atl. Coast Line RR Co.*, 154 F. Supp. 71, aff'd., 253 F. 2d 753. It was held that a railroad employee may properly be discharged where he allows an investigator to trespass upon company property in order to obtain pictures to be used in litigation against the railroad.

acting contrary to the interests and sensitivities of an opposing party, it would seem that the ultimate and paramount question is not whether the conduct is contrary to the private interests of the opposing party, but, rather, whether the attorney has taken unfair or unethical advantage of the opposing party. In the present case it, therefore, must be determined whether, under the evidence presented, it has been shown that Respondent, by employing Orlando, took unfair advantage of the Baltimore & Ohio Railroad.

Litigation by its very nature often results in an estrangement of traditional loyalties. Thus, where an employer and an employee become involved in litigation, their respective interests may be diametrically opposed. Both the employer and employee may well believe that the other has taken an unreasonable position, and that in the taking of such an unreasonable position there has been a breach of a mutual duty of fidelity. Even though both parties may be proceeding in the utmost of good faith, such feelings often may not be avoided.

In the investigative aspect of litigation, traditional loyalties are likewise to be strained or distorted. This difficult problem has to a certain extent been met by various legal doctrines adopted by the courts, statutory provisions, and rules of ethics. For example, the various common law and statutory "privileges" have a most significant effect in this area. Rules of ethics, such as Canon 39 of the Canons of Professional Ethics, likewise have a significant effect. That canon provides:

"Witnesses

"A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party. In so doing, however, he should

scrupulously avoid any suggestion calculated to induce the witness to suppress or deviate from the truth, or in any degree to affect his free and untrammeled conduct when appearing at the trial or on the witness stand."

Further, Section 60 of 45 U. S. C. A., a statutory provision which has been the subject of much discussion in this litigation, clearly meets the possible problem of a distorted concept of loyalty. That section provides:

"Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided,* That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

"If any provision of this chapter is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the chapter and the applicability of such provision to other persons and circumstances shall not be affected thereby."

It would be a work of supererogation to review all statutory or legal doctrines which, either directly or tangen-

tially, bear upon the problem under consideration. Suffice it to say that the above-mentioned statutory and judicially adopted doctrines are representative of those which bear upon the problem.

It has been a long-standing and accepted practice for corporations to employ persons to investigate claims which their fellow employees have made against their common employer. It is also a long-standing practice for these investigators to aid both inside and outside counsel in litigation which results from such claims. Surely an employee-claimant may personally consider that the employment of such an inside investigator and his use by the corporation's attorneys is not in consonance with mutual duties of fidelity existing between his employer and him, and between fellow employees. Notwithstanding mutual duties of loyalty, it is clear that the practice of employing such an investigator and the use of his services by the corporation's attorneys is proper.* The essential justification for such a practice is that the ultimate purpose of the adversary system (both investigation and litigation functions) is to secure the truth, and, thus, justice. To use the concept of loyalty to preclude efforts to secure the truth is, with certain limitations, a policy which may not be justified.

While the ultimate goal of the investigative function is to secure the truth, it would be naive to even suggest that investigators employed by corporations are always unbiased and objective in their investigation of a particular matter. This fact has not, however, and should not be used as a basis for holding that practice of employing such investigators and the use of their services by a company's attorneys is improper in that it might not always

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* It should go without saying that the same principle applies in many areas of the employer-employee relationship.

result in its salutary purpose—the truth. Rather, courts have condemned the practice only where it has been shown that it has been unfairly and immorally used.

As indicated above, where an attorney, in representing the interests of his clients, employs as an investigator an individual who is also employed by a party against whom his clients are making claims, it might well be that said other party will consider the employment of its employee and his use by the attorney as not in consonance with the employee's duty of fidelity. This is not unlike the feeling which an employee might experience when his employer and its attorneys used one of his fellow employees to investigate a claim which the employee has made against his employer. Since the latter practice has never been considered to be *per se* improper, consistent logic dictates that the former practice likewise must not be considered to be *per se* improper. The salutary purpose and the justification for both practices is that they are directed towards the ascertainment of the truth. That both practices are open to abuse is manifest. The point is that while neither practice is *per se* improper, the abuse of either is clearly improper.*

In *Mahoning County Bar Association v. Ruffalo, supra,* the majority opinion seems to take the position that it is *per se* improper for an attorney to employ as an investigator an individual who is also employed by a party against whom his clients are making a claim regardless of that employee's duties for either employer. This Court considers that position to be erroneous and, therefore, respectfully refuses to follow the same.

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* During the oral arguments held on April 29, 1965, the Court asked certain questions relative to the principles which have just been discussed. In its brief which was filed after these arguments, the Mahoning County Bar Association completely avoided any discussion of the same.

In light of what has been stated above, the Court finds that Respondent's use of an employee of the Baltimore & Ohio Railroad to investigate cases involving said Railroad was not a practice which was *per se* improper. Notwithstanding the fact that the practice is not *per se* improper, the question arises as to whether it has been shown by competent evidence that Respondent's use of Orlando was otherwise improper. Again, the only evidence with regard to Orlando's actual activities is adequately summarized in the following testimony of the Respondent:

> "His job specifically has been to investigate cases which I turn over to him to investigate particularly pertaining to railroad cases, to find witnesses, to obtain statements from witnesses, to help me in—and assist me in matters regarding railroad knowledge and the operation of railroads, and on occasion to transport witnesses for me." (Tr. 765.)

There is no evidence or claim made that Orlando had a fiduciary duty to his employer and that Respondent caused a breach thereof. On the contrary, it is clear that no such fiduciary relationship existed. There is no evidence or claim made that the Respondent either caused Orlando to perform work for the Respondent during the hours when he was employed by the Railroad or that Orlando actually did such work during these hours. There is no evidence or claim made that Respondent either caused Orlando to trespass upon the property of the Baltimore & Ohio Railroad in order to obtain information for Respondent, or that Orlando actually did so trespass. There is no evidence or claim made that Respondent caused Orlando in any manner to influence the testimony of any persons whom he interviewed, or that Orlando actually did attempt to influence such testimony. Further, there is no evidence or claim made that Respondent in any other manner

caused Orlando to take unfair advantage of the Baltimore & Ohio Railroad in the performance of his duties as an investigator, or that Orlando so did.*

This Court is of the opinion that the evidence is entirely insufficient to support a finding that Respondent caused Orlando to engage in unfair and unethical practices in the actual investigation of Respondent's cases. Moreover, no contention has been made in this specific regard.

As has previously been noted, the majority opinion in the *Mahoning County Bar Association v. Ruffalo,* in effect, holds that the employment of Orlando was *per se* improper. During the course of the State disbarment proceedings, Respondent stated that he did not keep detailed records relevant to Orlando's employment for the reason that he feared that the Baltimore & Ohio Railroad might be sensitive towards Orlando's employment by Respondent. In holding that the employment of Orlando was *per se* improper, the Court stated that notwithstanding Respondent's claim that such employment was not *per se* improper, the testimony relevant to Respondent's efforts to protect Orlando showed that he knew such employment was actually improper. This Court, having found that Respondent's conduct was not *per se* improper, and no contention having been made or direct evidence offered that Respondent caused Orlando to engage in unfair and unethical conduct in the actual investigation of Respondent's cases, it may not reasonably be found, on the basis of Respondent's statements to the effect that he was trying to protect Or-

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* Again, it should be noted that while Respondent was charged with using Orlando to solicit cases, the Ohio Supreme Court did not make findings with regard to said charges; and that this Court will not, under the circumstances previously discussed, make findings with regard to said charges either directly or indirectly.

lando, that Orlando, in effect, acted unfairly or unethically in the actual investigation of Respondent's cases.

This Court finds that Respondent has, under the principles enunciated by the United States Supreme Court in *Selling v. Radford, supra,* shown cause why he should not be disbarred from practice before this Court.

At the present time disbarment proceedings against the Respondent are pending in the Sixth Circuit Court of Appeals. Since the issues raised in the Sixth Circuit Court of Appeals are identical to those raised here, a final order will be deferred pending a decision by that Court. In the meantime, an order will be entered restoring Respondent to practice before this Court. In the event that the Sixth Circuit Court of Appeals reaches a different conclusion, this Court will reconsider its findings. Otherwise, a final order will be entered consistent with conclusions reached in this memorandum opinion.

APPENDIX C.

OPINION OF UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided December 29, 1966.)

Before O'SULLIVAN, PHILLIPS and EDWARDS, Circuit Judges.

O'SULLIVAN Circuit Judge. Upon the Supreme Court of Ohio's certification to us that respondent John Ruffalo, Jr., had been indefinitely suspended from the practice of law, we ordered that "John Ruffalo, Jr., show cause if any he has, on or before May 12, 1965, why he should not be stricken from the roll of counsel of this Court."

After extensions granted at the request of respondent, we received his response and brief, as well as a brief amicus curiae by the Ohio State Bar Association in support of the Ohio Supreme Court's order, and the cause has now been argued to a panel of this Court.

In 1962, the Mahoning County Bar Association filed with the Ohio Board of Bar Commissioners on Grievances and Discipline, charges of professional misconduct against respondent Ruffalo. The said Board is made up of seventeen members of the Ohio Bar, chosen, one each, from Ohio's seventeen judicial districts. They are appointed by the Supreme Court of Ohio, pursuant to its Rule XXVII (1) and (3),[1] 167 Ohio St. lxxvii, and act as an arm of that Court.

Fourteen alleged instances of misconduct made up the charges against respondent. The Board of Commissioners convened a panel of three of its members to take evidence on these charges and make an initial report. The charges covered generally acts of solicitation of FELA cases, main-

[1] Now Rule XVIII (1).

tenance of persons asserting claims, attempted bribery, and hiring a railroad employee, Michael Orlando, to act as an undercover agent to assist Ruffalo in soliciting and investigating cases against various railroads, including Orlando's employer, the B & O Railroad.

The panel conducted hearings which extended from December 26, 1962, to August 16, 1963, testimony taken comprising 1,034 pages of transcript. The panel report sustained seven and dismissed seven of the charges. It was unanimously adopted by the seventeen member Board of Commissioners. The charges sustained involved solicitation, maintenance of clients, attempted bribery to dissuade a witness from testifying against Ruffalo, and the use of Orlando as an undercover agent.

The Findings of Fact, Conclusions and Recommendation of the Board were returned to the Ohio Supreme Court. The Recommendation of the Board was that "Respondent be disbarred." The Ohio Court sustained charge 8, maintenance of clients, and 13, use of the undercover agent Orlando. It gave judgment that Ruffalo "be suspended for an indefinite period of time from the practice of law." *Mahoning County Bar Association v. Ruffalo,* 176 Ohio St. 263 (1964). Certiorari was denied by the Supreme Court of the United States. *Ruffalo v. Mahoning County Bar Association,* 379 U. S. 931 (1964). Five members of the Ohio Court joined in the majority opinion, a sixth member concurred in the result, and the seventh dissented. As to five of the charges sustained by the Board of Commissioners covering solicitation, and attempted bribery to dissuade a witness from testifying against Ruffalo, the Ohio majority said,

> "The members of this court are not in agreement as to whether the facts are as the Board of Commissioners recommended they should be found with respect to some of the other charges against respondent."

In deciding that Ruffalo should be suspended from practice, the Ohio Court, in addition to its consideration of the current charges, recited and took into account the fact that in 1957 Ruffalo had been found "guilty of unprofessional conduct in his office as an attorney at law * * * in that he did by and through duly authorized agents and employees solicit professional employment from sundry people."

Following the Ohio Supreme Court decision, the United States District Court for the Northern District of Ohio, Eastern Division, pursuant to its own rule, commenced an inquiry as to the fitness of Mr. Ruffalo to continue as a practitioner in that Court. The District Judge had before him the record and proceedings which culminated in the decision of the Ohio Supreme Court. He disagreed, however, with that decision and refused to suspend Ruffalo from practice in the District Court. *In re Ruffalo,* 249 F. Supp. 432 (N. D. Ohio, E. Div. 1965). However, he withheld the entry of a final order, reciting that "In the event that the Sixth Circuit Court of Appeals reaches a different conclusion, this Court will reconsider its findings." The matter before us is not an appeal from the said District Court, but is our own consideration of Ruffalo's standing as a practitioner in this Court.

We should preliminarily observe that our own Rule 6(3), prior to recent amendment, could be read as automatically striking from our roll of counsel the name of any lawyer disbarred in any court of record. It has been amended and we consider this matter in keeping with the requirements and admonitions of *Theard v. United States,* 354 U. S. 278, 1 L. Ed. (2) 1342 (1957) and *Selling v. Radford,* 243 U. S. 46, 61 L. Ed. 585 (1917). These decisions forbid Federal Courts from acting in total reliance on a state judgment. We have before us, and have re-

viewed, the entire record developed by the Ohio proceedings, but think it proper to dispose of the matter primarily upon the charges on which the Ohio Court disciplined Mr. Ruffalo.[2] The facts as to these are not in dispute. We consider whether we find insupportable the Ohio Court's determination that such facts disclosed unprofessional conduct warranting the discipline imposed and whether they warrant similar discipline by us.

The facts as to charge No. 8 are that Ruffalo, during the pendency of their FELA cases, advanced living expenses to three clients. This conduct was found to offend Canons 10 and 42 of the Canons of Professional Ethics. Canon 10 declares that:

> "The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."

and Canon 42 provides that:

> "A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation. He may in good faith advance expenses as a matter of convenience, but subject to reimbursement."

On this subject, we set out the following extract from the Findings of the Board of Commissioners:

> "While it may be questioned whether or not an occasional advance or loan by a lawyer to a client constitutes a violation of Canon 10 or Canon 27, it is clear that where such advances are frequently made to various clients over an extended period of time, such practice does establish the violation of Canon 10 in

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[2] Our failure to discuss them should not be construed as indicating that we disagree with or find unreliable the other findings of the Board of Commissioners. We cannot accept a contrary assertion in the dissenting opinion. We set out as an appendix hereto the Board of Commissioners' reports on charges 3, 8, 9, 10, 11 and 12, all of which were sustained. The appendix does not cover charge 13 inasmuch as we discuss it at length herein.

that the lawyer acquires an interest in the subject matter of the litigation which he is conducting, beyond the payment of his fee. Moreover the practice constitutes an indirect form of solicitation in providing an inducement to seek out such lawyer for employment for reasons unrelated to their professional competence. The facts in the present case establish that the Respondent advanced money to Clara Beighley, Naomi Clark and Andrew Masters in various amounts, which according to Respondent's own testimony totaled $2,936.00. It further appears that the practice of Respondent in making such advances was known. One of the witnesses, Elijah Doster, testified that when he contacted Naomi Clark about employing Respondent, Doster told her that the Respondent would lend her money if she needed any. Naomi Clark confirmed this testimony. Andrew Masters testified that the subject of advancing money was discussed with Respondent on the first occasion that Masters visited him."

The Supreme Court of Ohio, in agreement with Opinion No. 288 of the Professional Ethics Committee of the American Bar Association, 41 A. B. A. Journal 33 (Jan. 1955)[3] expressed its view that,

"It is obvious that where the advancement of living expenses is made, as in the instant case, to enable a client and his family to survive, any agreement by the disabled client to repay them would not have the effect of providing the attorney with any reasonable source of repayment other than the proceeds received on trial or settlement of his client's claim. In effect, the attorney has purchased an interest in the subject matter of the litigation that he is conducting. The

[3] The late Shackelford Miller, Jr., then, and until his death, a judge of this Court, was a member of, and concurred in the opinion of, the Professional Ethics Committee of the ABA (Opinion No. 288).

canons contemplate that this will be proper only where the advance is for 'expenses of litigation.' "

In the case of *Dombey, et al. v. Detroit, Toledo & Ironton Railroad*, 351 F. (2d) 121 (CA 6, 1965) we recognized the Ruffalo opinion as apparently announcing the law of Ohio, albeit that it appeared to overrule earlier Ohio decisions. While we are not here required to follow Ohio law, we have thus been made aware of the thinking of its Bar and Supreme Court. The bar of Ohio, acting under its laws and the control of the Supreme Court of that state has a responsibility to maintain the prestige and integrity that should, without exceptions to expediency, be marks of a profession of which we also are members. We may, therefore, give respect to the product of its effort to arrive at and express conceptions as to what is and what is not unprofessional conduct by any Ohio lawyer whom we have admitted to practice before us.

We need not, and do not, announce a rule for this Circuit that, standing alone, the conduct involved in Charge No. 8 (the furnishing of living expenses to his clients) would prompt us to discipline Ruffalo. We do not reach that question. We are satisfied that with Ruffalo's previous conviction in 1957 of solicitation, and the conduct making up Charge 13, there is sufficient to permit us, consistent with "principles of right and justice," to "allow the natural consequences of the judgment [of the Supreme Court of Ohio] to have their effect * * *," *Selling v. Radford*, 243 U. S. 46, 51, and strike Mr. Ruffalo's name from the roll of counsel admitted to practice in this Court.

The admitted facts of Charge No. 13 are that Ruffalo, apparently a specialist in FELA cases, hired Michael Orlando, an employee of the Baltimore & Ohio Railroad, to act under cover as his agent in investigating cases against various railroads. This undercover work included in-

vestigating and obtaining evidence to be used in Ruffalo's cases against Orlando's own employer, the B & O. The employment extended from 1953 to July 19, 1962, when Orlando was suspended by his railroad employer for allegedly soliciting claims (presumably on behalf of Ruffalo). Ruffalo paid Orlando $25 per day, plus expenses for his work, which was carried on outside of Orlando's regular working hours as a railroad brakeman. Through the years 1957 to 1961 this amounted to a total of $13,982.62, of which $4,176 was paid within the first six and one-half months of 1961. This information had to be obtained from the Internal Revenue Form 1099 withholding slips. No other records were available as Orlando was paid in cash, giving receipts to Ruffalo therefor. Regular entries of these transactions were not made in Ruffalo's books and in response to the panel's subpoena to produce his relevant records, Ruffalo testified that whatever writings had been made were destroyed by him as soon as his income tax returns for 1962 and prior years had been examined by the Internal Revenue Service. The Ohio Court's opinion covers this subject in detail and we recite this much of it:

> "The respondent was ordered by a subpoena issued by the board * * * to produce 'all your records, checks, disbursements and receipts of any kind or nature showing payments to Michael Orlando * * * for the years 1957, 1958, 1959, 1960, 1961 and 1962.' Respondent only produced the withholding slips * * *. Respondent was also requested by the chairman of the panel to produce all of his records so that counsel for the relator could determine for themselves whether or not his records contained any entries which would reflect on the payments made by respondent to Orlando * * *. The respondent did not produce his records and refused to comply with the request of the chairman of the panel * * *."

The Court's opinion quotes from Ruffalo's justification for the minimal record keeping and the destruction of whatever records had been made as follows:

> " 'We worked on that basis for the particular reason that we didn't want this man to be accused of exactly what he was accused of, which he wasn't doing and which he did not do, but the fact was that I was trying to protect him. He was trying to help me as an investigator. He had certain knowledge, certain abilities that I needed, and I was trying to protect him, and that was the reason that we worked this thing out this way. With any other person that has ever done any work for me * * * I have paid him by check, but particularly for security reasons for this man, that was the reason we worked it this way.' " 176 O. S. 266.

The Ohio Court's reaction to the foregoing is portrayed by this excerpt:

> "The evasive attempts of both Ruffalo and Orlando to explain their lack of records on the basis that they were no longer needed to sustain their income tax returns arouses a strong suspicion that those records contained information which would have been damaging to both Ruffalo and Orlando. Their 1961 income tax returns could not have been filed before January 1962 and were not due until April 1962. In July 1962, B & O charged Orlando with soliciting cases against it for Ruffalo. In September 1962, Ruffalo was charged with employing Orlando to solicit cases for him. Ruffalo undoubtedly knew that such charges were being prepared and investigated long before that time. It is difficult to believe that the 1961 federal income tax returns of either Orlando or Ruffalo had been checked by the Internal Revenue Service before July or even September 1962. At that time, they definitely knew that any records showing either of them to be innocent of charges of soliciting would be helpful to both. It is almost impossible to reach any reasonable conclu-

sion that the records of either, at least for 1961, were not destroyed in order to prevent their use against Orlando in the proceedings brought against him by B & O and against Ruffalo in the proceedings brought against him." 167 O. S. 268, 269.

Its view that Ruffalo's conduct disqualified him for practice at Ohio's bar is thus expressed:

"The panel questioned the respondent at length * * * on his views relating to the practice of employing Orlando to investigate cases against the Baltimore & Ohio, while he was employed by the company. He saw nothing wrong with the practice because he was 'doing something altogether different from the type of work he was doing on the railroad' * * *. But he admitted employing Orlando because of the advantages of having a railroad man working for him * * *. He saw no distinction between employing any railroad employee and one who was investigating claims against his own employer, because 'our concepts have changed * * *'." 176 O. S. 266, 267.

* * * * *

"In our opinion, one who believes that it is proper to employ and pay another to work against the interests of his regular employer is not qualified to be a member of the Ohio Bar. He is even less qualified if he does so when he knows, as the evidence clearly indicates Ruffalo did know, that it is improper to do so." 167 [176] O. S. 269.

The rules which should guide us here come from *Theard v. United States*, 354 U. S. 278, 1 L. Ed. (2) 1342 (1957); and *Selling v. Radford*, 243 U. S. 46, 61 L. Ed. 585 (1917). In *Theard*, the Supreme Court remanded a disbarment case to the District Court which had disbarred an attorney on the assumption that a decision of the Supreme Court of Louisiana foreclosed independent inquiry by the United States District Court.

The disbarment of Theard took place some eighteen years after the charged misconduct—the forgery of a promissory note—notwithstanding the fact that it was found that at the time of the forgery Theard "was suffering under an exceedingly abnormal condition, some degree of insanity," and notwithstanding that after release from an insane asylum and restoration to capacity he had for six years practiced law, arguing numerous cases before the Supreme Court of Louisiana without any charge of misconduct or impropriety.

This factual dissimilarity with the case before us is not of controlling significance, but does make quite understandable the Supreme Court's insistence on a Federal Court weighing the validity of the state court's conclusions. Mr. Justice Frankfurter, writing the *Theard* opinion did observe, however, that:

> "If the accusation rests on disbarment by a state court, such determination of course *brings title deeds of high respect.*" (Emphasis supplied.)

and emphasized that recognition should be accorded a state court judgment subject, however, to the rule expounded in *Selling v. Radford,* 243 U. S. 46, 61 L. Ed. 585. In that case the Supreme Court allowed an attorney who had been disbarred by the Michigan Supreme Court to show cause why he should not be disbarred in the United States Courts by bringing the record of the state court proceedings before it and filing a brief. That opportunity has been afforded Ruffalo here, and we have followed the rule of *Selling v. Radford,* which we quote:

> "[W]e should recognize the condition created by the judgment of the state court unless, from an intrinsic consideration of the state record, one or all of the following conditions should appear: 1, that the state procedure, from want of notice or opportunity to be heard, was wanting in due process; 2, *that there was*

such an infirmity of proof as to facts found to have established the want of fair private and professional character on our part that we could not, consistently with our duty, accept as final the conclusion on that subject; or 3, that some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice, we were constrained to do so." 243 U. S. 46, 50, 51, 61 L. Ed. 586, 587, 588. (Emphasis supplied.)

Obedient to that rule, we have formed our own judgment, not, however, unconscious of the fact that six judges of the Ohio Supreme Court and seventeen lawyers of the Bar of Ohio, of such standing as to be selected to serve on the Board of Commissioners on Grievances and Discipline, have, after fair procedure, concluded that Mr. Ruffalo's conduct called for his suspension from practice. We do not find in the record of the state proceedings, "Such an infirmity of proof as to the facts found to have established the want of * * * [Ruffalo's] fair private and professional character" to lead us to a conviction that we cannot, consistent with our duty, "accept as final the conclusion" of the Supreme Court and the Ohio Bar.

Able and distinguished counsel have urged us, on the merits, to disagree with Ohio's assessment of the facts now before us. We consider this matter as judges, but we are aware that we are also members of the bar, sharing with our fellow lawyers a just pride in our profession and we are properly concerned that the legal profession be worthy of the respect that it asks today's society to accord it. We have a responsibility not only to Mr. Ruffalo but also to the prestige of our own court. We cannot find totally invalid the view that an experienced lawyer who hires a railroad employee to act as an undercover agent to obtain evidence

and information for use in suits against his own employer, does not exhibit the fair character and integrity which must be a mark of a lawyer. Ruffalo asserts that his use of cash to pay his agent, his failure to carry these transactions in his books, and his destruction of what records he did have were necessary to protect Orlando from reprisals by his regular employer. The Ohio Bar, its Supreme Court and this Court had, and have, the right to draw inferences as to what this conduct portrays. The absence of records would not hide what was going on if, when inquiry was made, both Orlando and Ruffalo told the truth. What then was there to fear from honest record keeping?

Respondent argues that the Association of American Railroads was guilty of questionable practice in investigating the misconduct of Orlando and Ruffalo and that the American railroads historically have unfairly resisted and impeded the presentation of claims by their injured employees. Unless we are ready to announce a rule that a lawyer may fight on any level chosen by his adversary, we are not here required to pass on such charges. With the liberal use of our discovery practice, we consider that adequate preparation can be made without resorting to the methods chosen by Mr. Ruffalo. We do not believe we should tell today's society that notwithstanding the respect we ask it to give us as a profession of skillful and high minded men, we do not have the ability to adequately represent our clients except through planting secret agents in the shops of those we call to account in the courts. If this kind of espionage has become a way of life in some of today's business competition, such reality should not prompt us to say that no more is expected of today's lawyers than that they conform to the minimal standards of the market place.

Charge No. 13, the employment of Orlando, was added

as a specification of misconduct during the course of the Board of Commissioners' hearing. Mr. Ruffalo objected to this being done, and the Board advised him that he could have time to offer proofs in opposition to the charge. The charge was based upon testimony of Ruffalo and Orlando already in the record. No request was made for further time, and no additional proofs were offered by Ruffalo on the point. We find no procedural impropriety in this regard. Neither do his counsel raise the question here. They do, however, assert deprivation of due process in that prior to Ruffalo's described use of Orlando, he was never told that such would be looked upon as misconduct. They complain for him that no Canon of Ethics had ever been promulgated forbidding this practice. We will not hold that due process requires that our bar associations anticipate every conceivable type of misconduct in which any of its members may indulge, and then fashion and announce a Canon of Ethics to fit each act of misconduct. Surely our profession is not so morally and ethically naive as to need always advance definition of what is, and what is not, impermissible behavior.

This is an original proceeding in this Court. We are not reviewing the ruling by the District Court. Respectful of the careful consideration of the matter by the District Judge, we advise our disagreement with his conclusions. While not controlling, we think it proper to observe that it would be most unseemly, considering the record in the case, to have the United States Courts accepting for practice before them a lawyer who has, after due process, been suspended from practice in the courts of his own state.

The name of John Ruffalo, Jr., is hereby stricken from the roll of counsel permitted to practice before this Court. This discipline shall remain in force until the further order of this Court.

APPENDIX.

FINDINGS OF FACT OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE.

CHARGE No. 3.

It is charged that the Respondent, acting through an authorized agent, solicited the claim of Mrs. Naomi Mae Clark against the Baltimore and Ohio Railroad Company by reason of the death of her husband, Major Robert Clark who died August 13, 1957 in an accident while employed as an engine house laborer for the Baltimore & Ohio Railroad.

Naomi Clark testified that her husband had worked for the Baltimore & Ohio Railroad in Newcastle and that he died on August 13, 1957 and that two weeks after her husband's death, Elijah Doster came to see her and told her that the Respondent wanted her case. She further testified that she knew of the Respondent and that a Mr. Orlando and others had talked to her about a week after her husband's death and one of those who had seen her gave her the Respondent's telephone number. She said that Elijah Doster told her that the Respondent was the man to employ and that he was also handling Elijah Doster's claim against the railroad.

It appears that Mrs. Clark had known Elijah Doster for a period of approximately twenty-one years. She testified that arrangements were made through Mrs. Betty Orlando, the sister of Michael Orlando, to meet Respondent in Newcastle and that she did meet him there. Betty Orlando is the sister-in-law of Michael Orlando who was an employee of Respondent and also the Baltimore & Ohio Railroad. On September 3, 1957 Mrs. Clark signed a contract employing Respondent to represent her. The contract (Respondent's Exhibit 4) is a printed form which recites in the printed portion that

"I, the undersigned, do hereby retain John Ruffalo as my attorney, acting only upon my own free will without the inducement or solicitation of any person or persons * * *."

Mrs. Clark testified that she had been told by Elijah Doster that the Respondent would let her have money if she needed any during the time he would have her case, and that when she saw the Respondent in September, 1957 he told her that if she needed money he would give it to her. Mrs. Clark's case was settled on November 18, 1960, for $21,000.00, and the Respondent advanced approximately $600.00 to her from time to time before the settlement.

Elijah Doster testified that he had employed Respondent to represent him in a claim against the Baltimore & Ohio Railroad and that while his case was pending, Respondent called him and asked him to talk to Naomi Clark about her case against the railroad, and that pursuant to this request he did talk to Mrs. Clark about employing the Respondent. Doster testified that Angelo Medura phoned him the day before the hearing by the Panel and requested him not to come to court. It also appears that more than a year after Doster's case was settled, the Respondent contacted Doster and gave him $50.00 as a refund for medical fee which related to Doster's case against the railroad. Doster executed a receipt for the fee, dated July 14, 1961 (Respondent's Exhibit 1) and a year later on June 20, 1962 signed a statement for the Respondent (Respondent's Exhibit 2) to the effect that the $50.00 paid to Doster by Ruffalo "was given to me solely as a refund of the medical bill incurred by an examination of Dr. Robinsteen. Dr. Robinsteen died and was unable to appear for me, requiring me to obtain other doctors. * * *." This statement was witnessed by Doster's son, Samuel Doster.

On July 14, 1961, the same day on which Doster was requested to sign a receipt for the $50.00, he also signed an affidavit at the Respondent's office, which affidavit was prepared by the Respondent (Respondent's Exhibit 6). This affidavit recites that

> "Elijah Doster, after first being duly sworn, according to law, deposes and says that at the request of Mr. Ruffalo, he recommended John Ruffalo of Youngstown, Ohio, to Naomi Clark, that he contacted Gordy Marks of Newcastle, Pennsylvania, the brother-in-law of Naomi Clark, who spoke to her about Mr. Ruffalo, and that he learned a few days after that that Naomi Clark had gone to see Mr. Ruffalo, that after his original contact with Mr. Marks, he had talked with Naomi Clark and she informed him that she had gone out to see Mr. Ruffalo, * * * and that it was upon the recommendation that he had made that she came to see Mr. Ruffalo."

When Respondent was testifying on his own behalf he admitted he asked Elijah Doster to recommend Respondent to Naomi Clark, but says this was done "about 15 or 20 minutes before I had any—before I represented her."

Sam Doster testified that he heard his father state to Mr. Ruffalo that he saw Mrs. Clark at Mr. Ruffalo's request.

It also appears that contact was made by Respondent and Angelo Medura of Newcastle, Pennsylvania, with Sam Doster, relating to the question of Elijah Doster's appearance to testify before the Panel, and that Sam Doster was given $5.00 by Medura and a bottle of Respondent's whiskey. This took place at a meeting between Youngstown and Newcastle on December 24, 1962.

At the original hearing held by this Panel in December, 1962, Sam Doster testified about a discussion between himself and Medura, at this meeting, concerning a charge

of homicide then pending against Sam Doster in Pennsylvania. According to Sam Doster, Medura told him that he knew it would cost quite a fee "And he said 'You know that John can't do it himself,' that 'Whatever you need,' that 'I'll get in touch with John for you, and he would give it to me to give you.'" He further testified that this conversation took place outside of the Respondent's car while Respondent was sitting in the car. However, at a subsequent hearing held by the Panel on August 16, 1963, the same Sam Doster was called to testify on behalf of the Respondent. At this hearing he testified that he lied at the previous hearing; that Medura had offered him nothing to persuade his father, Elijah Doster, not to appear at the hearing before the Panel.

Doster said he'd decided to tell the truth because he realized his testimony at the previous hearing had damaged Respondent and he didn't feel right about it. He said he'd lied because he thought the Respondent had not represented his father properly and had been so informed by some representatives of the American Railroad Association. He could not explain why he decided since the December hearing, to change his story. Since the December hearing, he was tried on the homicide charge in Pennsylvania and found guilty. He was out on bond at the time of the August hearing. Whether this had anything to do with the change in this witness' story was not shown. Because of this recantation by Sam Doster of his testimony at the preceding hearing, the Board has placed no credence whatever in this witness' testimony, given either at the preceding hearing or at the present hearing.

At the hearing in December, 1962 the Respondent offered a tape recording of a conversation between the Respondent and his associate, Mr. Montani, with Elijah Doster. Although the recording was played at one of the

hearings held by the Panel, it was inaudible. At the last hearing held on August 16, 1963, the Respondent produced David Burton, a free lance court reporter, who testified that there had been submitted to him a transcript of the tape recording, which had been prepared by the Respondent's secretary, and that the witness compared this transcript with the recording and corrected the transcript in several respects. The witness' transcript was then offered in evidence as an exhibit. However, the Panel sustained the objection to this exhibit and the Board has given it no consideration for the reason that a witness' testimony concerning his interpretation of a tape recording of a conversation with another witness violates the hearsay rule and the rule excluding the opinions of witnesses except in certain defined exceptions of which this is not one.

The Respondent testified that he was first contacted about the Naomi Clark case, by Mrs. Alexander Orlando, Mike Orlando's sister-in-law, on September 30, 1957, when he had returned from a vacation, and that Mrs. Orlando said that she was a friend of Naomi Clark and that Naomi Clark wanted to see him and he suggested that Miss Clark come to see him, but Mrs. Orlando told him she couldn't come and suggested that the Respondent come to Mrs. Orlando's home. Respondent said that he had never known Mrs. Orlando before, although she was the sister-in-law of Mike Orlando who was then an employee of the Respondent.

Mrs. Lois Scopio, Michael Orlando's sister, testified that she was a bookkeeper at a store in Newcastle where Naomi Clark had purchased a coat, and that Naomi Clark had no money to pay for the balance due on the coat, and in the course of the conversation about her account she asked the witness whether she had ever heard of the Respondent, and then asked the witness to call the Respond-

ent, which Mrs. Scopio said she did, but was unable to reach him because he was on a vacation. She testified that Naomi Clark subsequently told her that she had talked to Betty Orlando, Michael's sister-in-law, and had asked her to get in touch with the Respondent.

CONCLUSION.

It is the conclusion of the Board that the evidence with respect to this charge establishes that Respondent was guilty of misconduct in soliciting employment from Mrs. Naomi Clark in violation of Canon 27 of the Canons of Professional Ethics.

CHARGE NO. 8.

It is charged that the Respondent advanced monies to Clara E. Beighley, Naomi Clark, and Sam Cotellesse while handling their claims, and deducted such advances from settlements of their claims. The uncontradicted evidence establishes that Respondent did advance a total of $1,025.-00 to Clara Beighley during the period of time that he represented her, and that he advanced $611.00 to Naomi Clark during the time that he represented her. Respondent's representation of each of these parties extended over a period of several years. Respondent admits that these funds were advanced, but justifies the advances on the ground that they were made as an act of kindness at a time when these clients were in difficult circumstances. No evidence was offered to prove any advances to Sam Cotellesse.

The Legal Ethics Committee of the American Bar Association rendered an opinion, Number 288, on October 11, 1954, to the effect that payments, pending trial in personal injury cases, by an attorney to or for the benefit of his injured client, for any purpose other than to cover expenses of litigation subject to reimbursement, are im-

proper. In reaching this conclusion the committee considered Canon 42 which provides:

> "A lawyer may not properly agree with a client that the lawyer shall pay or bear the expense of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement."

The Committee also considered Canon 10 which provides:

> "The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."

Canon 42 refers to expenses which are connected with the litigation such as court costs, depositions and similar expenses. It was the committee's opinion that a lawyer who makes advances to his client for other purposes thereby acquires an interest in the subject matter of the litigation which he is conducting in violation of Canon 10. The committee also observed that the practice, if publicized, constitutes a holding out by the lawyer of an improper inducement to clients to employ him in addition to the assurance of performing legal services for the client. In other words, such practice can constitute an indirect form of solicitation. The committee observed that the conclusion which it reached is contrary to the conclusion reached by the Supreme Court of Illinois in the case of *State E. R. Chicago Bar Association v. McCallum,* 341 Ill. 578, 173 N. E. 827. Three of the judges of the Supreme Court of Illinois dissented from the conclusion of the majority. The question was considered by Judge Beamer of the United States District Court for the Northern District of Indiana, Hammond Division, on September 26, 1962, in the case of *El Janny v. Cleveland Tankers, Inc.,* 209 F. Supp. 91. Judge Beamer held that a lawyer was not entitled to an order reimbursing him for monies advanced to his client and stated in the opinion:

> "The propriety of the practice of loaning or advancing money to clients in personal injury cases has long been questioned by the courts and the organized bar."

He cited and quoted from Opinion 288 of the Committee of the American Bar Association.

While it may be questioned whether or not an occasional advance or loan by a lawyer to a client constitutes a violation of Canon 10 or Canon 27, it is clear that where such advances are frequently made to various clients over an extended period of time, such practice does establish the violation of Canon 10 in that the lawyer acquires an interest in the subject matter of the litigation which he is conducting, beyond the payment of his fee. Moreover the practice constitutes an indirect form of solicitation in providing an inducement to seek out such lawyers for employment for reasons unrelated to their professional competence. The facts in the present case establish that the Respondent advanced money to Clara Beighley, Naomi Clark and Andrew Masters in various amounts, which according to Respondent's own testimony totaled $2,936.-00. It further appears that the practice of Respondent in making such advances was known. One of the witnesses, Elijah Doster, testified that when he contacted Naomi Clark about employing Respondent, Doster told her that the Respondent would lend her money if she needed any. Naomi Clark confirmed this testimony. Andrew Masters testified that the subject of advancing money was discussed with Respondent on the first occasion that Masters visited him.

Conclusion.

It is, therefore, the conclusion of the Board that the Respondent is guilty of unprofessional conduct in violation of Canon 10 and Canon 27.

CHARGE No. 9.

It is charged that Respondent promised to advance money and later did advance money to Andrew Masters during the pendency of Masters' case against the Pennsylvania Railroad. The evidence establishes that there was a discussion between the Respondent and Masters about the advancement of money to Masters at the time Masters first saw Respondent and signed his contract of employment on May 29, 1958 (Respondent's Exhibit 10), and that Respondent advanced monies to Masters on fifteen separate occasions in a total of over $1,200.00 during the period Respondent was representing Masters.

CONCLUSION.

It is the conclusion of the Board that Respondent is guilty of unprofessional conduct in violation of Canon 10 and Canon 27 of the Canons of Ethics.

CHARGE No. 10.

It is charged that Respondent is guilty of unprofessional conduct in attempting to influence Elijah Doster in that he endeavored to have Doster sign a false statement that Doster had not been contacted by the Respondent in an effort to have Doster help in the solicitation of the case of Naomi Clark; that at the time Respondent attempted to take said false statement from Doster he paid him the sum of $50.00 in cash. Some of the evidence in support of this charge is discussed in connection with Charge No. 3 pertaining to solicitation by Doster on behalf of the Respondent of Naomi Clark's case. The evidence does establish that on or about July 14, 1961, Respondent prepared an affidavit which Elijah Doster refused to sign until it was corrected, but there is no evidence as to the

contents of such affidavit and, therefore, it cannot be said that the Respondent attempted to have Doster sign a false affidavit. However, the evidence does establish that on the same date Respondent paid $50.00 to Doster and requested him to sign the affidavit, an investigation was being made by a Mr. White of the American Association of Railroads relating to Respondent's activities in suspected solicitation of claims. The payment by Respondent to Doster on that date was obviously for the purpose of influencing Doster as a prospective witness.

Conclusion.

It is the conclusion of the Board that the Respondent was guilty of misconduct in attempting to influence Elijah Doster by the payment of $50.00 to him, in violation of Canon 29 and Canon 32 of the Canons of Professional Ethics.

Charge No. 11.

It is charged that on Christmas Eve, December 24, 1962, the Respondent attempted to intimidate Samuel Doster who was to appear before the hearing panel, by approaching him at Lincoln Knolls Bowling Alley on Route 422 in Youngstown, to prevent him from appearing as a witness by offering him sundry considerations; that the Respondent gave Sam Doster a fifth of whiskey and $5.00 for the purpose of prevailing upon him to prevent his father, Elijah, from appearing as a witness.

The evidence with respect to this charge was reviewed above in connection with the consideration of Charge No. 3 relating to Naomi Clark's claim. The evidence is uncontradicted that the Respondent and Angelo Medura did have a meeting with Samuel Doster on Christmas Eve, December 24, 1962, which was after the Respondent re-

ceived notice of the hearing scheduled by the Panel for December 26, 1962. Respondent said that he merely talked to Sam Doster and asked him to request Sam Doster's father, Elijah, to tell the truth. He denies attempting to influence Sam Doster. It is nevertheless a fact, as testified to by Angelo Medura, that the Respondent did contact Medura for the purpose of having Medura talk to Andrew Masters and that Medura did contact Andrew Masters in connection with the charges pending against Respondent, and that the Respondent was also with Medura for the purpose of talking to Sam Doster. At this meeting Medura did in fact give Sam Doster $5.00 and a bottle of whiskey which was the property of Respondent. While the evidence does not definitely establish that the Respondent was a party to the discussion between Medura and Sam Doster, it is a fact that such discussion took place outside of Respondent's automobile and that Respondent was in the automobile at the time it took place. It is reasonable to infer that whatever discussion took place between Medura and Doster was known to Respondent. Inasmuch as the admitted purpose in seeing Sam Doster was to have him contact his father, Elijah, about his testimony at the hearing before the Panel, it must be concluded that the gifts made to him at this meeting, were for the purpose of influencing him and thereby accomplishing the objective of the meeting. In reaching the conclusion with respect to this charge, the Panel completely disregarded the testimony of Sam Doster given at the original hearing of the Panel in December, 1962, as stated previously in the discussion on Charge No. 3, because this witness recanted that testimony at the hearing held on August 16, 1963 and said that he lied at the December hearing. For the same reason, the Panel disregarded Doster's testimony given at the hearing held on August 16, 1963

CONCLUSION.

It is the conclusion of the Board that the Respondent is guilty of misconduct as charged and has violated Canon 29 and Canon 32 of the Canons of Professional Ethics.

CHARGE No. 12.

It is charged that the Respondent, through one or more of his agents acting on his behalf, did attempt to intimidate the witness, Andrew Masters, on or about Sunday, December 23, 1962, by having his agent offer Masters the sum of $300.00 to keep him from appearing before the Panel as a witness on behalf of the Relator.

Some of the evidence with respect to this charge is discussed above in connection with Charge No. 11. It does appear from the testimony of Andrew Masters that Angelo Medura called Masters on December 23, 1962, and met him and told Masters that "He had an opportunity to get some beer joint, that Mr. Ruffalo was going to back him up * * *"; that Medura further said "You can get $300.00 and you don't have to appear and you're doing me a hell of a big favor." Medura admits talking to Masters on Sunday, December 23, 1962, at Newcastle about Masters' appearance as a witness before the Panel, and that he saw Masters at the Respondent's request. He denied offering Masters any money and explained that Masters was angry with Respondent because Masters was not satisfied with the verdict which had been obtained and because the Respondent did not appeal the case. Medura does admit stating to Masters "Andy, what are you going to gain by going over to Youngstown to hurt this man."

In view of the fact that Medura had contacted Masters at Respondent's and had also talked to Sam Doster in the presence of Respondent about being a witness before

the Panel in the charges against the Respondent, and had admittedly offered Doster inducements not to appear as a witness, the Board concludes that the evidence supports the charge that Medura did offer Masters a consideration to prevent Masters from appearing as a witness against the Respondent.

At the hearing which the Panel held on August 16, 1963, the Respondent called two witnesses, Joseph Edward Petite and Carl R. Foster, who testified that on December 27, 1962, they had gone to the dining room of the Tod Hotel in Youngstown at the request of the Respondent, and taken a table next to that which was occupied by Mr. and Mrs. Masters and a Mr. White, who represented the American Association of Railroads, and that during this conversation Master was overheard telling White that Medura did not offer Masters any money, and that Masters was a friend of Medura's and did not want to hurt him, and White replied that while Masters did not want to hurt Medura he did want to get at Ruffalo, and White told Masters that Masters should go in and testify about being offered $300.00 by Medura. Both of these witnesses admitted that the Respondent had formerly represented them in personal injury cases. They were both employed at the time they gave their testimony. They said they occasionally did work for the Respondent. The Relator objected to the testimony of both of these witnesses concerning the conversations which they allegedly overheard between White and Masters. The objection was sustained for the reason that if the purpose of such testimony was to contradict the testimony given by Masters at the previous hearing, it was necessary to lay a foundation for such contradictory testimony by first asking Masters himself about the alleged conversation between him and White. This was not done, and therefore, the testimony of both of these witnesses was

nothing more than hearsay. *King v. Wicks*, 20 Ohio 88; *Columbus v. Freeze*, 100 O. A. 37, 59 O. O. 474; 56 O. Jur. (2d) 816, Sec. 380.

CONCLUSION.

It is the conclusion of the Board that the Respondent is guilty of unprofessional conduct as charged and has violated Canon 29 and Canon 32 of the Canons of Professional Ethics.*

EDWARDS, Circuit Judge, dissenting. Respectfully, I dissent from the opinion of this court.

This is a disturbing record on practically all counts. The State of Ohio, acting through its Bar Association and Supreme Court, has disbarred respondent on grounds which will be discussed. The Ohio disbarment is final and is not before us for review.

Dealing with a motion to disbar respondent before the United States District Court for the Northern District of Ohio, the United States District Judge reviewed the same record and held that adequate grounds for disbarring respondent from practice before the federal courts had not been established. *In re Ruffalo*, 249 F. Supp. 432 (N. D. Ohio 1965).

We deal, under our Court Rule 6(3),[1] with a similar petition to disbar respondent in this court. We review the same record.

The respondent was a lawyer in active practice principally representing railroad employees in Federal Em-

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* **Petitioner's Note:** Charges 3, 9, 10, 11 and 12 were found not proved by the Ohio Court; the Court disagreeing with facts as recommended by the Board of Commissioners, 176 O. S. 269.

[1] Rules of United States Court of Appeals for Sixth Circuit (May 1, 1956, as amended April 15, 1966).

ployees Liability Act suits against railroad companies. The Association of American Railroads instigated an investigation of respondent which led directly to the present charges and proceedings.

Most of the testimony adverse to respondent was that of former clients in relation to whose cases respondent had not succeeded in achieving a result satisfactory to them—or for that matter, to him.

The basic charges at the outset were that respondent had engaged in unethical conduct as a lawyer by soliciting lawsuits and employing others to solicit lawsuits for him—in short, what is termed "ambulance chasing."

The State Bar Association panel dismissed seven of fourteen charges and found respondent guilty on the other seven. In its review of the same record the Supreme Court of Ohio, however, found respondent guilty of unethical practices in only two instances. These concerned the making of certain loans to two of respondent's clients and the hiring as an investigator of a person who was also a brakeman for the Baltimore & Ohio Railroad.

In finding the loans made by respondent to be violations of the Canons of Professional Ethics of the American Bar Association (which have been adopted by rule in Ohio), the Ohio Supreme Court relied upon Canon 10, which says: "The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."

The undisputed facts are that out of a very busy practice and after a thorough and thoroughly hostile investigation respondent was shown to have made such loans in two instances.

On June 16, 1957, Mrs. Clara Beighley's husband died as a result of an injury received while working as a conductor for the Baltimore & Ohio Railroad. His widow

employed Ruffalo to represent her in her claim against the B. & O. In the next four years respondent advanced periodic sums of $50 to Mrs. Beighley, which ultimately totaled $1,025.

The other loan pertained to another B. & O. widow. Mrs. Naomi Mae Clark's husband died August 13, 1957, in an accident while employed as an engine house laborer. Mrs. Clark retained respondent on September 3, 1957, and approximately three years later received $21,000 in a settlement with the B. & O. Meantime, respondent had made periodic advances to her which totaled $611 at the time of settlement.

I cannot in good conscience agree that the making of such small loans as these to two admittedly impoverished widows represented purchasing an interest in litigation. If this record showed that making maintenance loans to clients was a general practice employed by respondent so as to become widely known and hence to constitute an economic attraction for potential clients, we would have facts from which such an inference properly could be drawn. Clearly we do not have such proofs in this record.

We recognize, of course, that the American Bar Association's Professional Ethics Committee has published an opinion, No. 288, (41 A. B. A. Journal 33 (Jan. 1955)) which may be cited as general support for the view expressed by the Ohio Supreme Court. This view is, however, against the great weight of opinion in the courts in this country. *People ex rel. Chicago Bar Association v. McCallum,* 341 Ill. 578, 173 N. E. 827 (1930); *Johnson v. Great Northern Ry. Co.,* 128 Minn. 365, 151 N. W. 125 (1915); *Hildebrand v. State Bar of California,* 18 Cal. 2d 816, 117 P. 2d 860 (1941); *In re Moore,* 8 Ill. 2d 373, 134 N. E. 2d 324 (1956); *In re Sizer,* 306 Mo. 356, 267 S. W. 922 (1924); *Bank of Chenango v. Hyde,* 4 Cow.

567 (N. Y. 1825); see also *Grievance Committee of Fairfield County Bar v. Nevas*, 139 Conn. 660, 96 A. 2d 802 (1963); *State ex rel. Florida Bar Association v. Dawson*, 111 So. 2d 427 (1959). We likewise feel that it is a view which is basically inconsistent with the attitude toward legal representation in FELA cases expressed by the Supreme Court of the United States in *Brotherhood of Railroad Trainmen v. Virginia, ex rel. Virginia State Bar*, 377 U. S. 1 (1964).

The view of the Illinois Supreme Court adopted in *McCallum* in my opinion expresses the majority view in this country on this issue:

> "The evidence shows that at various times the McCallums have advanced living expenses to needy clients who had claims for personal injuries against railroad companies where respondent had a fee contract, which was a lien upon any damages which might be recovered upon the injury. In most such cases the clients were unable to work, had no money or property, and their only asset was the claim for damages against the railroad, upon which respondent had a lien. We know of no law which makes it more unethical, under such circumstances, to advance living and medical expenses to the client, and so prevent his becoming a public charge, than it would be, if the client's only asset were a piece of real estate, to advance him, on a mortgage thereon, money for such expense. It is not uncommon for attorneys to commence actions for poor people and make advances of money necessary for the prosecution of the suit upon the credit of the cause. Thus a man in indigent circumstances is enabled to obtain justice in a cause where without such aid he would be unable to enforce a just claim. *Christie v. Sawyer*, 44 N. H. 298; *Shapley v. Bellows*, 4 N. H. 355. The practice of advancing money to the injured client with which to pay living expenses or hospital bills during the pendency of

the case and while he is unable to earn anything may in a sense tend to foment litigation by preventing an unjust settlement from necessity, but we are aware of no authority holding that it is against public policy or of any sound reason why it should be so considered. *Johnson v. Great Northern Railway Co.*, 128 Minn. 365, 151 N. W. 125, L. R. A. 1917B, 1140; *Potter v. Ajax Mining Co.*, 22 Utah 273, 61 P. 999. By canon 42 of the Ethics of the American Bar Association, it is permissible for an attorney to advance costs and court charges for his client, with the understanding that the same are to be ultimately paid by the client," *People, ex rel. Chicago Bar Association v. McCallum, supra*, at 589.

I turn now to the second issue in this case. Respondent employed one Orlando, whose regular occupation was that of a brakeman on the B. & O. Railroad. He worked on a night shift. Respondent testified that Orlando's employment with him was that of an investigator of FELA cases brought by respondents against railroads, including Orlando's employer.

I note that Orlando's work involved no supervisory responsibilities to his employer and no access to records, confidential or otherwise, which would have assisted him in his daytime job with respondent.

But discounting these factors as much as I do, I cannot avoid concluding that Orlando's access to the B. & O.'s property and personnel would be of potential value to respondent and that it would some times be impossible (probably even for Orlando) to know when Orlando was working for the railroad and when he was investigating for respondent.

I believe the day is long gone when a railroad so owned its employees' souls that it should be held impermissible for one of its brakemen to accept outside em-

ployment on his own time (even as an investigator of lawsuits against another railroad). But the employment of a railroad employee to investigate accident claims against his own employer opens a tempting door to industrial spying which no person of ordinary conscience should be asked to go by every normal work day.

Respondent's actions in hiring Orlando for the purposes admitted by respondent, in concealing the employment relationship and in being a great deal less than fully cooperative with the Bar Association's investigation of his record in this matter convince the majority that he was aware of the conflict of interest inevitable (for Orlando!) in his hiring Orlando to investigate accident cases against Orlando's own employer. These facts also convince me.

This, however, does not end the matter. In order for a lawyer properly to be found guilty of an offense and barred, perhaps forever, from the practice of his profession, he should have advance notice that the act he was charged with was an offense, and prior to his hearing he should have written notice of the charge made against him. Respondent here had neither.

The charge we deal with here was numbered 13 and it was added by oral motion at page 662 of this 1034 page transcript over respondent's strong objection. Such procedural violation of due process would never pass muster in any normal civil or criminal litigation. Nor should it here. *Selling v. Radford*, 243 U. S. 46 (1917).

Even more to the point, the Ohio Bar Association and the Ohio State Supreme Court were unable to cite any canon of ethics which purported to forbid respondent's conduct in hiring Orlando. Neither do my colleagues. Nor is any prior ethics opinion or case precedent cited for the holding here.

Under the circumstances, I would think that the course of action taken by the Illinois Supreme Court in *In re Brotherhood of Railroad Trainmen,* 13 Ill. 2d 391, 398, 150 N. E. 2d 163, 168 (1958), was an appropriate one to follow. In declaring a representation plan (previously approved by another court) to be improper, the Supreme Court then held that "proceedings looking toward the imposition of discipline should not be pursued. * * *" in that case.

There is an ancient adage, "Where there is smoke there is fire." If this were a governing rule of law, I would quickly have agreed with my brethren's result in this case. This record surely contains a great deal of smoke. The writer confesses that he, too, is capable of being impressed thereby.

Finding myself, however, in fundamental disagreement with relying for disbarment on the issues dealt with above, I undertook research of the record for a possible concurring opinion which I thought would be founded upon the ambulance chasing and witness tampering findings of the Ohio State Bar. To abbreviate a lengthy recital and weighing of a record of over 1,000 pages of transcript, I note that I simply could not find reliable evidence upon which to approve these findings. I deduce that my colleagues cannot do so either. Yet they include as an appendix these same findings upon which neither they nor the Ohio Supreme Court saw fit to rely.

For the reasons I have indicated above, I feel there are "grave reasons" why this court should agree with the United States District Judge in declining to accept the judgment of disbarment of the Supreme Court of Ohio.

APPENDIX D.

SECOND MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT.

BATTISTI, *J.*:

In a memorandum opinion dated October 4, 1965, this Court found that Respondent John Ruffalo, Jr., had shown cause why he should not be disbarred from practice before the United States District Court for the Northern District of Ohio. *In re Ruffalo,* 249 F. Supp. 432 (N. D. Ohio, E. Div., 1965). In the same opinion the Court made the following observation:

> "At the present time disbarment proceedings against the Respondent are pending in the Sixth Circuit Court of Appeals. Since the issues raised in the Sixth Circuit Court of Appeals are identical to those raised here, a final order will be deferred pending a decision by that Court. In the meantime, an order will be entered restoring Respondent to practice before this Court. In the event that the Sixth Circuit Court of Appeals reaches a different conclusion, this Court will reconsider its findings. Otherwise, a final order will be entered consistent with conclusions reached in this memorandum opinion."

On December 29, 1966, the Sixth Circuit Court of Appeals, in a two to one decision, concluded:

> "This is an original proceeding in this Court. We are not reviewing the ruling by the District Court. Respectful of the careful consideration of the matter by the District Judge, we advise our disagreement with his conclusions. While not controlling, we think it proper to observe that it would be most unseemly, considering the record in the case, to have the United States Courts accepting for practice before them a lawyer who has, after due process, been suspended from practice in the courts of his own state.

> "The name of John Ruffalo, Jr., is hereby stricken from the roll of counsel permitted to practice before this Court. This discipline shall remain in force until further order of this Court."

In view of the opinion of the United States Court of Appeals for the Sixth Circuit, the findings and conclusions of October 4, 1965, have been reconsidered.

At the outset, and in all candor, it should be noted that this Court has an abiding conviction that the findings and conclusions of October 4, 1965, are correct. While, technically, there may be no absolute obligation to follow the decision of the Court of Appeals, other considerations dictate that the findings and conclusions of October 4, 1965, be vacated. Foremost among them is a deep conviction that the orderly and effective administration of justice compels a district court to faithfully respect and defer to the opinions of its circuit court of appeals. Thus, an order will be entered suspending John Ruffalo, Jr., from practice before the United States District Court for the Northern District of Ohio until further order of this Court.

/s/ FRANK J. BATTISTI,
United States District Judge.

APPENDIX E.

DECREE OF THE CIRCUIT COURT OF APPEALS.

(December 29, 1966.)

This cause is before the court upon its order to the respondent, John Ruffalo, Jr., to show cause why his name should not be stricken from the roll of counsel of this court, and upon the said respondent's response to said order and upon due consideration thereof, and for reasons set forth in the opinion of this court filed contemporaneously herewith,

IT IS ORDERED that the name of John Ruffalo, Jr., be, and it is, hereby stricken from the roll of counsel permitted to practice before this court. This discipline shall remain in force until the further order of this court.

Entered by order of the court.

/s/ CARL W. REUSS, *Clerk.*